

# NOTES

## Trigger Laws

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## INTRODUCTION

“This unconstitutional statute will take effect when it becomes constitutional.” That odd, self-referential formulation represents a type of statute known, when people know of it at all, as a “trigger law.” Trigger laws are legal anomalies. They are a rare phenomenon, though not a new one, and their number has increased in recent years. What purpose could these trigger laws possibly serve?

State legislatures enact trigger laws mainly to express their disapproval of the Supreme Court’s interpretation of the Constitution. Although trigger laws could address any area of constitutional law, most existing trigger laws target abortion and would criminalize it should the Supreme Court overrule *Roe v. Wade*.<sup>1</sup> Part I of this Note surveys the history of abortion trigger laws and describes the four currently on the books to illustrate how trigger laws work.

Legislators introducing trigger bills sometimes offer their own, alternative visions of constitutional meaning, and advocates of trigger laws find support in the nation’s history of constitutional interpretation outside the courts. Part II evaluates trigger laws against the theoretical backdrop provided by departmentalism and popular constitutionalism, two modes of thinking about the role of non-judicial actors in constitutional interpretation. Using the abortion trigger laws as case studies, Part II finds that trigger laws do not comfortably fit either model of extrajudicial constitutionalism because they reflect neither majoritarian preferences nor legislative constitutionalism.

Part III analyzes Rule-of-Law problems raised by trigger laws. Although some popular constitutionalists attempt to reconcile Rule-of-Law values with democratic constitutionalism, this Note argues that trigger laws demonstrate ways in which those values are inherently in tension. Part IV concludes by considering whether any alternatives to trigger laws allow state officials to express disagreement with the Court’s constitutional interpretation without raising the same Rule-of-Law concerns.

## I. TRIGGER LAWS DEFINED

Trigger laws are two-part statutes. They contain both substantive provisions and a “trigger” provision. If challenged in court, the substantive provisions would be held unconstitutional under current judicial doctrine. The trigger provision states that the substantive provisions will not take effect until a

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1. 410 U.S. 113 (1973).

change in constitutional law would allow them to be upheld by the courts.<sup>2</sup> Because the substantive provisions have no immediate effect and will not be enforced, their constitutionality cannot be challenged in court until they are triggered.

Hypothetically, states could enact trigger laws, the substance of which would violate any doctrine of constitutional law. A trigger law might provide, for instance: “No elementary school in this state may admit both black and white students. This statute will not take effect until the Supreme Court of the United States overrules *Brown v. Board of Education*.”<sup>3</sup> Another could read: “Effective as of the day when the Supreme Court reverses its decision that the Second Amendment protects an individual right to bear arms,<sup>4</sup> possession of a handgun within the home shall be punishable by a fine of \$1000.”

Of course, trigger laws need not touch upon controversial issues. One actual trigger law, adopted in Washington, provides that a vendor-compensation statute becomes effective when its substantive provisions would not be found to violate the dormant Commerce Clause.<sup>5</sup> Because Congress can authorize states to enact legislation otherwise impermissible under the dormant Commerce Clause,<sup>6</sup> Washington’s statute is triggered when either “[t]he United States [C]ongress grants individual states the authority to impose sales and use tax collection duties on remote sellers” or “[i]t is determined by a court of competent jurisdiction, in a judgment not subject to review, that a state can impose sales and use tax collection duties on remote sellers.”<sup>7</sup> Most trigger laws currently in existence, however, are less mundane and address one controversial issue in particular: abortion.

#### A. ANTI-ROE TRIGGER LAWS

Since 2005, four states have enacted trigger laws that would criminally prohibit abortion should the Supreme Court overrule *Roe v. Wade* and find that the Constitution no longer protects a woman’s decision to terminate her preg-

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2. My usage is limited to those statutes that include both a trigger provision and a substantive provision that would take effect if Supreme Court precedent were overruled. Some confusion has resulted from applying the “trigger law” label to other types of statutes. I explain the differences between those faux trigger laws and the ones discussed in this Note in section I.B.

3. 347 U.S. 483 (1954).

4. See *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008).

5. See Act of Mar. 22, 2007, ch. 6, § 1705(1), 2007 Wash. Sess. Laws 1, 90 (codified at WASH. REV. CODE § 82.32.720 (2008)).

6. See, e.g., *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (“When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 542–43 (1949).

7. Act of Mar. 22, 2007, ch. 6, § 1705(1), 2007 Wash. Sess. Laws at 90; see also *id.* § 1705(2), 2007 Wash. Sess. Laws at 90 (“The department of revenue shall provide notice to affected taxpayers, the legislature, and others as deemed appropriate by the department, if either of the contingencies in this section occurs.”).

nancy.<sup>8</sup> Other state legislatures have considered similar measures.<sup>9</sup> Although these laws currently define the post-*Roe* legal landscape in a number of states, trigger laws have received little attention from advocates on either side of the abortion debate<sup>10</sup> and have been hardly mentioned in legal scholarship.<sup>11</sup>

Though all trigger laws currently on the books were enacted recently, trigger laws have been part of states' opposition to *Roe* since it was decided.<sup>12</sup> Many state legislatures greeted the newly recognized constitutional right to terminate a pregnancy with hostility, and a number codified their reaction. Within three months of the decision, Idaho and South Dakota enacted anti-*Roe* trigger laws with substantive provisions banning most abortions.<sup>13</sup> The Idaho statute would have become effective

[i]n the event that the states are again permitted to safeguard the lives of unborn infants before the twenty-fifth week of pregnancy as a result of the Supreme Court of the United States overruling the decisions [of *Roe* and *Doe*], or an amendment to the United States Constitution overruling these decisions, [and] the governor . . . , upon his determination that such event has occurred, make[s] a proclamation declaring said event to have happened . . . .<sup>14</sup>

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8. NARAL PRO-CHOICE AM. & NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 12 (17th ed. 2008).

9. In 2007, the Oklahoma, Texas, Utah, and Virginia legislatures considered trigger laws; Mississippi and North Dakota enacted them. *Id.*

10. For example, officials at both Texas Alliance for Life and Planned Parenthood of the Texas Capitol Region stated that they were giving a pending trigger bill low priority. Polly Ross Hughes, *Bill Would Trigger Abortion Law*, HOUSTON CHRON., Jan. 11, 2007, at B5 (“‘What do you know?’ [Sarah Wheat, of Planned Parenthood.] said, laughing. ‘We’ve found some common ground.’”).

11. The few law review articles addressing the topic have done so only in passing. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 835 n.68 (2007) (noting Louisiana's adoption of a trigger ban); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1028–29 (same); Nicolas P. Terry, *Under-Regulated Health Care Phenomena in a Flat World: Medical Tourism and Outsourcing*, 29 W. NEW ENG. L. REV. 421, 433 (2007) (noting that overturning *Roe* could increase interstate travel to procure abortions, particularly in light of trigger bans already on the books); Judith G. Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 MONT. L. REV. 299, 311 (2007) (including trigger laws in list of recent anti-choice state legislation); Janessa L. Bernstein, Note, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463, 1465 n.11 (2008) (noting that six states have adopted “trigger laws” banning abortion if the Court overturns *Roe*). As of 2006, a search of LexisNexis's database of law review articles turned up nothing. Posting of Jonathan Zittrain to PrawfsBlog, [http://prawfsblawg.blogs.com/prawfsblawg/2006/02/trigger\\_laws.html](http://prawfsblawg.blogs.com/prawfsblawg/2006/02/trigger_laws.html) (Feb. 25, 2006, 10:41 EST).

12. For a discussion of the mobilization against *Roe* in the context of extrajudicial constitutionalism, see Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 408–24 (2007).

13. Act of Mar. 17, 1973, ch. 197, 1973 Idaho Sess. Laws 442; Act of Mar. 28, 1973, ch. 146, 1973 S.D. Sess. Laws 206; *see also* Richard Wasserman, Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237, 240–41 & n.27 (1974) (referencing Idaho and South Dakota's statutes as examples of state hostility to *Roe*).

14. Act of Mar. 17, 1973, ch. 197, § 14, 1973 Idaho Sess. Laws at 448.

South Dakota's trigger law was much simpler, stating: "The effective date . . . shall be that specific date upon which the states are given exclusive authority to regulate abortion."<sup>15</sup>

Beginning in the 1980s, the Supreme Court gradually gave states more space to restrict access to abortion, and state lawmakers struggled to adopt abortion restrictions satisfactory to both them and the Court.<sup>16</sup> As part of that process, Idaho and South Dakota repealed their 1973 trigger laws. Reacting to *Webster v. Reproductive Health Services*,<sup>17</sup> the Idaho legislature repealed its trigger law in 1990,<sup>18</sup> voting at the same time to enact a tough abortion ban with limited exceptions. Legislators hoped the new ban would survive review in the Supreme Court and set the outer boundaries for permissible restrictions on abortion.<sup>19</sup> The trigger law was repealed, but the new abortion ban never became law—the governor vetoed the new restrictions and allowed the repeal to go forward, dealing a double blow to the bill's pro-life backers.<sup>20</sup> Unlike Idaho, where legislators sought to push the envelope, South Dakota moved to accommodate the Court's new, more permissive doctrine. The state repealed its trigger provision in 1993<sup>21</sup> when it enacted a series of abortion regulations like those the Supreme Court had recently upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>22</sup>

Within fifteen years of their disappearance, abortion trigger laws were back and more numerous than before. Between 2005 and 2007, South Dakota, Louisiana, Mississippi, and North Dakota all enacted new trigger laws. The substantive provisions of the four existing abortion trigger laws are similar. Each makes performing (or procuring or prescribing) an abortion a felony, while only some include exceptions for protecting the mother's health or life or

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15. Act of Mar. 28, 1973, ch. 146, § 17, 1973 S.D. Sess. Laws at 209.

16. See generally David M. Smolin, *Abortion Legislation After Webster v. Reproductive Health Services: Model Statutes and Commentaries*, 20 CUMB. L. REV. 71 (1989); Richard G. Wilkins et al., *Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy*, 1991 BYU L. REV. 403.

17. 492 U.S. 490 (1989).

18. Act of Mar. 30, 1990, ch. 207, 1990 Idaho Sess. Laws 464.

19. See Editorial, *Showdown in Boise*, WASH. POST, Apr. 5, 1990, at A22.

20. See Idaho: RTL "Releases Open Letter Attacking" Andrus' Veto, ABORTION REP. (Am. Political Network, Wash., D.C.), Apr. 10, 1990, available at Westlaw, 4/10/90 APN-AB 5. Governor Andrus apparently consulted the authors of both articles cited *supra* note 16. See *id.*

21. Act of Mar. 15, 1993, ch. 249, § 10, 1993 S.D. Sess. Laws 370, 374. The state had already repealed some of the substantive provisions from its trigger law. See Act of Feb. 26, 1976, ch. 158, § 16-9, 1976 S.D. Sess. Laws 227, 257 (repealing statute criminalizing post-quickening abortions as manslaughter); Act of Apr. 16, 1977, ch. 189, § 126, 1977 S.D. Sess. Laws 258, 282 (repealing prohibition on all abortions not necessary to save the mother's life); Audio: Hearing on H.B. 1249 Before the H. State Affairs Comm., 2005 Leg., 80th Sess. 00:05:35–00:06:03 (S.D. Feb. 11, 2005) [hereinafter *S.D. House Hearing*], available at <http://lightning.state.sd.us:8080/ramgen/80session/hst24hb1249a.rm> (statement of Rachel Hansen, State Director, South Dakota Right to Life).

22. 505 U.S. 833 (1992) (upholding Pennsylvania's laws on informed consent, waiting periods, parental consent, and recordkeeping); see Act of Mar. 15, 1993, ch. 249, §§ 2, 4, 1993 S.D. Sess. Laws at 371–73 (parental consent, informed consent, and waiting periods); Act of Mar. 15, 1993, ch. 251, 1993 S.D. Sess. Laws 375 (recordkeeping).

involving cases of sexual assault or incest.<sup>23</sup> Unlike the 1973 trigger laws, which would have imprisoned women who had abortions,<sup>24</sup> the trigger laws adopted in recent years apply only to parties other than the mother.<sup>25</sup> Although the trigger laws' substantive provisions are similar, each trigger provision is unique.

South Dakota's law, adopted in 2005, becomes "effective on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy."<sup>26</sup> The legislature had initially enacted a law that would have taken effect when the Court recognized states' authority to "regulate or prohibit abortion at all stages of pregnancy"<sup>27</sup> but amended it almost immediately thereafter.<sup>28</sup> The revision was necessary because states were *already* permitted to regulate abortion at all stages of pregnancy.<sup>29</sup> The amended statute remains unclear as to when a Supreme Court decision would trigger the law—whether, for example, a decision upholding a partial-birth abortion ban not limited to post-viability abortions would be sufficient<sup>30</sup>—and who determines that the law has been triggered.

Louisiana's statute, adopted the year after South Dakota's, is triggered when the state's "authority to prohibit abortion" is restored by constitutional amendment or "[a]ny decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*."<sup>31</sup> In providing that the law becomes effective even if *Roe* is "reverse[d] . . . in part," the Louisiana statute is problematically

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23. LA. REV. STAT. ANN. §§ 40:1299.30(C), (D), (F) (2008) (making exceptions when necessary to save the mother's life or prevent permanent organ impairment); MISS. CODE ANN. § 41-41-45(4) (Supp. 2008) (making exceptions "for the preservation of the mother's life or where the pregnancy was caused by rape"); N.D. CENT. CODE §§ 12.1-31-12(2), (3) (Supp. 2007) (providing physicians with an affirmative defense when the abortion was necessary to save the mother's life or in cases of rape or incest); S.D. CODIFIED LAWS §§ 22-17-5 to 22-17-5.1 (2006) (making an exception where necessary to save the mother's life); *see also* S.B. 186, 80th Leg., Reg. Sess. §§ 50.03, 50.05 (Tex. 2007) (proposed Texas trigger bill including an exception to prevent the mother's death). "The trigger laws are much harsher than the pre-*Roe* laws . . ." Linda Hirshman, *If Roe Goes, Our State Will Be Worse Than You Think*, WASH. POST, Sept. 28, 2008, at B1, B5.

24. *See* Act of Mar. 17, 1973, ch. 197, § 16, 1973 Idaho Sess. Laws 442, 448; Act of Mar. 28, 1973, ch. 146, § 16, 1973 S.D. Sess. Laws 206, 209.

25. *See* sources cited *supra* note 23.

26. S.D. CODIFIED LAWS § 22-17-5.1 editor's note (2006). The original draft of the bill, which hewed closely to the language of the state's 1973 trigger law, read, "This Act is effective on the date that the states are given the exclusive authority to regulate abortion." *See* H.B. 1249, 80th Leg. (S.D. 2005), available at <http://legis.state.sd.us/sessions/2005/bills/HB1249p.htm> (original bill).

27. *See* H.B. 1249, 80th Leg., 2005 S.D. ch. 187, § 7 (S.D. 2005) (emphasis added).

28. *See* H.B. 1266, 80th Leg., 2005 S.D. ch. 188, § 1 (S.D. 2005). *Compare* S.D. H. JOURNAL, 80th Leg. (Mar. 22, 2005), available at <http://www.legis.state.sd.us/sessions/2005/journal/jrnH03221100.htm#21736> (recording notice of governor's approval of H.B. 1249), with S.D. H. JOURNAL, 80th Leg. (Mar. 22, 2005), available at <http://www.legis.state.sd.us/sessions/2005/journal/jrnH03221100.htm#21843> (delivering to governor H.B. 1266, amending H.B. 1249).

29. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872-73 (1992).

30. *Cf.* Gonzales v. Carhart (*Carhart II*), 550 U.S. 124 (2007) (upholding such a federal law).

31. LA. REV. STAT. ANN. § 40:1299.30(A) (2008) (citation omitted). Louisiana's abortion trigger law is unique in that the statute will not take effect if its doing so would render the state ineligible for federal Medicaid funds. *See id.* § 40:1299.30(B).

vague. Many would argue that the Supreme Court has partially overruled *Roe* a number of times,<sup>32</sup> suggesting that the Louisiana statute should already have taken effect. Louisiana's trigger law, like South Dakota's, does not specify who determines that the law has become enforceable; presumably courts will decide the issue when a prosecution is brought or an abortion provider challenges an impending prosecution.

Mississippi and North Dakota both enacted trigger laws in 2007. Mississippi's statute becomes effective

ten days following the date of publication by the Attorney General of Mississippi that the Attorney General has determined that the United States Supreme Court has overruled the decision of *Roe v. Wade*, and that it is reasonably probable that this section would be upheld by the Court as constitutional . . . .<sup>33</sup>

By answering the question of who determines that the statute has become effective, the Mississippi trigger law largely avoids the problem of deciding whether *Roe* has been overruled. The Mississippi attorney general still needs to parse the Supreme Court's decision, but other interested parties need only look to the attorney general's determination. The statute does not address whether the attorney general's decision is subject to judicial review—which might allow a judge to return the trigger law to its dormant status upon finding that *Roe* had not been overruled—or whether judicial review is limited to determining the constitutionality of the law's substantive provision—in which case the judge would enjoin the statute's enforcement if the attorney general were wrong.

The North Dakota statute “becomes effective on the date the legislative council approves by motion the recommendation of the attorney general . . . that it is reasonably probable that this Act would be upheld as constitutional.”<sup>34</sup> The original version of the North Dakota trigger provision resembled the Mississippi statute. The law could only be triggered “as a result of new decisions by the Supreme Court of the United States,” and once the attorney general certified that it should take effect; no action by the legislative council was required.<sup>35</sup> After lengthy discussions about alternative trigger provisions,<sup>36</sup>

32. See *infra* section III.B.

33. MISS. CODE ANN. § 41-41-45 (Supp. 2008) (italics added).

34. Act of Apr. 26, 2007, ch. 132, § 2, 2007 N.D. Laws 617, 618 (codified at N.D. CENT. CODE § 12.1-31-12 (2007) (editor's note)).

35. H.B. 1466, 60th Legis. Assemb. § 2 (N.D. 2007), available at <http://www.legis.nd.gov/assembly/60-2007/bill-text/HBEU0100.pdf>.

36. For legislative deliberation about the proposed trigger provisions, see *Conf. Comm. Meeting on H.B. 1466*, 2007 Leg., 60th Legis. Assemb. 1 (N.D. Apr. 20, 2007) [hereinafter *N.D. Conf. Comm. Minutes III*]; *Conf. Comm. Meeting on H.B. 1466*, 2007 Leg., 60th Legis. Assemb. 5 (N.D. Apr. 17, 2007) [hereinafter *N.D. Conf. Comm. Minutes II*]; *Conf. Comm. Meeting on H.B. 1466*, 2007 Leg., 60th Legis. Assemb. 1–7 (N.D. Apr. 16, 2007) [hereinafter *N.D. Conf. Comm. Minutes I*]; *Hearing on H.B. 1466 Before the S. Judiciary Comm.*, 2007 Leg., 60th Legis. Assemb. 1 (N.D. Mar. 21, 2007) [hereinafter *N.D. Senate Hearing II*]; *Hearing on H.B. 1466 Before the S. Judiciary Comm.*, 2007 Leg.,

the legislature removed all mention of a Court decision and required legislative approval of the attorney general's recommendation. Both changes are significant.

North Dakota's trigger law is the only one that can be triggered without any action by the Supreme Court. A Supreme Court decision *could* trigger the North Dakota statute, but so could the appointment of a new Justice.<sup>37</sup> More speculatively, the election of a President who promises to appoint Justices opposed to *Roe* might be sufficient, depending on the likelihood of a vacancy on the Court, the possibility that the Senate would confirm such a nominee, and the time lag between the statute becoming effective and its review by the Court. *Anything* that makes the attorney general more likely to conclude that it is "reasonably probable" that courts will uphold the statute could serve as the trigger, including a change in attorneys general if the new officeholder were to have a more sensitive "trigger finger."

North Dakota's trigger law is also the only one that explicitly gives legislators a role in determining when the law should be triggered, a change made to the bill after lawmakers questioned whether the decision should be left solely to the attorney general's discretion.<sup>38</sup> But not all legislators have a say in the matter. Only members of the Legislative Council—a seventeen-member body comprising the speaker of the house, the majority and minority leaders of both houses, and twelve other legislators<sup>39</sup>—participate in the decision to approve the attorney general's recommendation. Lawmakers arrived at this compromise after concluding that legislators should be a part of the triggering process but that the full, part-time legislature should not be called into a special session to approve the attorney general's recommendation.<sup>40</sup> Although inserting legislators into the process could also be seen as politicizing the decision to trigger the statute, the choice to involve the Legislative Council<sup>41</sup> and require a legal explanation from the attorney general suggests that legislators wanted the decision to be made on legal rather than political grounds.<sup>42</sup>

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60th Legis. Assemb. 1–2 (N.D. Mar. 13, 2007) [hereinafter *N.D. Senate Hearing I*]; *Hearing on H.B. 1466 Before the H. Judiciary Comm.*, 2007 Leg., 60th Legis. Assemb. 1–2 (N.D. Jan. 24, 2007) [hereinafter *N.D. House Hearing II*]. See also *Hearing on H.B. 1466 Before the H. Judiciary Comm.*, 2007 Leg., 60th Legis. Assemb. (N.D. Jan. 22, 2007) [hereinafter *N.D. House Hearing I*] (witness testimony).

37. See David G. Savage, *Roe v. Wade Really Could Depend on This Election*, L.A. TIMES, Oct. 5, 2008, at A14.

38. See *N.D. Conf. Comm. Minutes I*, *supra* note 36, at 3–4 (statements of Sen. Erbele and Rep. Koppelman); *N.D. Senate Hearing II*, *supra* note 36, at 1 (statements of Sens. Fiebiger and Nelson); *N.D. Senate Hearing I*, *supra* note 36, at 1 (statement of Sen. Fiebiger).

39. North Dakota Legislative Branch, Legislative Council General Overview, <http://www.legis.nd.gov/council/general/overview.html> (last visited Dec. 28, 2008).

40. See *N.D. Conf. Comm. Minutes I*, *supra* note 36, at 1–6.

41. The Council is staffed with attorneys who advise legislators on legal matters. North Dakota Legislative Branch, Legislative Council General Overview, *supra* note 39.

42. As one representative explained: "The [attorney general] would be presenting facts or opinion as the chief law enforcement officer of the state, and the legislative council would be responding [as] the

## B. TRIGGER LAWS DISTINGUISHED

Having defined trigger laws and provided some illustrations, it may be useful to distinguish them from other types of statutes with which they are sometimes confused. The trigger laws discussed in this Note are defined by their trigger provisions, which explicitly postpone the effectiveness of the laws' substantive provisions until they would not violate the Constitution. It is important to distinguish these trigger laws from (1) statutes, never repealed by the legislature, that were enacted before Supreme Court doctrine suggested their unconstitutionality; (2) statutes without trigger provisions that were enacted despite their apparent unconstitutionality and that remain on the books, unenforced by the executive or enjoined by a court; (3) statutes that declare a legislature's intent to pass laws currently prohibited by Supreme Court doctrine if the Court overrules itself but that include no automatically effective substantive provisions; and (4) statutes that aim to protect existing constitutional rights should the Supreme Court curtail their scope.

First, trigger laws are distinct from statutes that were enacted before the Court suggested their unconstitutionality and that have not since been repealed. "When a federal court, including the Supreme Court, holds a law to be unconstitutional, it does not excise the legislation from the statute books, but only signals that it will not permit the law to be enforced."<sup>43</sup> Where state legislatures have not repealed unconstitutional statutes and the Supreme Court overrules the precedent under which the statutes were unconstitutional, "the old laws would sometimes, perhaps typically, become operative and enforceable . . . ."<sup>44</sup> Trigger laws and these dormant laws are similar in that both are currently unconstitutional in substance but remain on the statute books, making their future enforcement possible absent any further legislative action.<sup>45</sup> How-

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governing board of the legislature while it's not in session. It's based upon the legal opinion of the chief law enforcement officer . . . ." *N.D. Conf. Comm. Minutes I*, *supra* note 36, at 4 (statement of Rep. Koppelman).

43. Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 615 (2007).

44. *Id.* at 612. For arguments against the enforceability of these statutes, see William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902 (1993); Teresa L. Scott, Note, *Burying the Dead: The Case Against Revival of Pre-Roe and Pre-Casey Abortion Statutes in a Post-Casey World*, 19 N.Y.U. REV. L. & SOC. CHANGE 355 (1992).

Fifteen states with pre-1973 statutes that violate the terms of *Roe* have not repealed those laws. See *CTR. FOR REPROD. RIGHTS, WHAT IF ROE FELL?: THE STATE-BY-STATE CONSEQUENCES OF OVERTURNING ROE V. WADE* 8–10 & n.28 (2004) [hereinafter *STATE-BY-STATE CONSEQUENCES*] (Alabama, Arizona, Arkansas, Colorado, Delaware, Massachusetts, Michigan, Mississippi, New Mexico, North Carolina, Oklahoma, Rhode Island, Vermont, West Virginia, and Wisconsin). Much of the scholarship on the state of abortion law in a post-*Roe* world has focused on the "revival" of these statutes. See, e.g., Fallon, *supra* note 43, at 612, 614–21; Treanor & Sperling, *supra*; Scott, *supra*.

45. A trigger law, by definition, must be enacted after a substantively identical law that was enacted prior to the Court's deciding such laws were unconstitutional. One could therefore argue that, if the Court overruled the precedent under which both laws are unconstitutional, enforcement of the trigger law would present fewer notice problems because the public is more likely to know about the more

ever, the dormant laws were not unconstitutional at the time of their enactment, so their passage was not affected by their obvious unconstitutionality, as is the case with trigger laws.<sup>46</sup>

Second, several states have adopted post-*Roe* or post-*Casey* laws that are at odds with the holdings of those cases. They are clearly or arguably unconstitutional under existing judicial doctrine but lack trigger provisions postponing their effects. States might adopt these *effective* statutes, like trigger laws, to express disapproval of the Court's work, but unlike trigger laws, these statutes are subject to judicial review. Therefore, states have an additional reason to enact these statutes: bringing "test cases" in which the Court might overrule the disfavored decision or limit its reach.<sup>47</sup>

Third, statutes are not trigger laws if they merely codify a legislature's intent to enact new laws *after* doing so becomes constitutionally permissible. Statements of legislative policy to prohibit abortion if *Roe* is overruled are more common than trigger laws and vary just as widely in how they are drafted.<sup>48</sup> The significant difference between these policy statements and trigger laws is that the former are not backed by a substantive provision primed to take effect should the Court change its interpretation of the Constitution: further action from the legislature would be required for the state to ban abortion.<sup>49</sup> If a future

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recent legislation. However, that a trigger law was enacted *more recently* does not mean that its enactment was in fact *recent enough* that its enforcement would not take the public by surprise.

46. See *infra* section II.B.

47. See *infra* section IV.B. Defending these laws in court may, however, prove costly to the state. See *infra* note 119.

48. See ARK. CODE ANN. § 20-16-701 (2005) ("It is the intention of the General Assembly to regulate abortions in a manner consistent with the decisions of the United States Supreme Court . . . . All provisions and all terms shall be construed so as to be consistent with those decisions."); 720 ILL. COMP. STAT. 510/1 (2006) ("[I]f those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."); KY. REV. STAT. ANN. § 311.710(5) (West 2006) ("If . . . the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored."); MO. ANN. STAT. § 188.010 (West 2004) ("It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes."); MONT. CODE ANN. § 50-20-103 (2007) ("It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation."). A number of other state legislatures have adopted pro-life policy statements that do not expressly anticipate *Roe* being overruled. See STATE-BY-STATE CONSEQUENCES, *supra* note 44, at 13 & n.42 (counting ten such provisions, many from states that also have policy statements indicating an intent to enact new prohibitions if *Roe* were reversed).

49. Some of the policy statements were previously backed by pre-*Roe* laws that could no longer be enforced; they stated that the old policies would be reinstated when they became constitutional. See, e.g., 720 ILL. COMP. STAT. ANN. 510/1. "However, all of these states have repealed or enjoined their pre-*Roe* bans or have enacted constitutional provisions that are in conflict with the bans. Therefore, . . . there would be nothing to reinstate if *Roe* were overturned." CTR. FOR REPROD. RIGHTS, WHAT IF *ROE* FELL?: THE LAWS IN YOUR STATE, THE DAY AFTER 13 (2007) [hereinafter *THE DAY AFTER*].

Confusion between the policy statements and trigger laws seems to have contributed to the recent

legislature declined to act upon its predecessor's policy statement, the policy statement would have no effect.

Fourth, trigger laws are different from statutes that would continue to protect currently recognized constitutional rights if the Supreme Court were to roll back their constitutional protection. The proposed Freedom of Choice Act (FOCA), for example, would codify protection for abortion so as to limit the effect of a Supreme Court decision overruling *Roe*.<sup>50</sup> If enacted, FOCA would prohibit states from “deny[ing] or interfer[ing] with a woman’s right to choose” to terminate her pregnancy before viability or, when necessary to protect her life or health, after viability.<sup>51</sup> Like the abortion trigger laws, FOCA anticipates *Roe* being overruled.<sup>52</sup> Unlike the trigger laws, the substantive provisions of FOCA would not likely be unconstitutional if the bill were enacted today, under the Court’s current jurisprudence.<sup>53</sup>

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series of abortion trigger laws. A 2004 report by the Center for Reproductive Rights identified six states with statutory policy statements, which the report called “‘trigger laws’ because they suggest that an abortion ban will immediately and automatically be triggered if *Roe* is overturned. Trigger laws . . . would not have this effect by themselves,” the report explained, because each had been repealed or enjoined. See STATE-BY-STATE CONSEQUENCES, *supra* note 44, at 13. South Dakota Right to Life, the group that drafted that state’s trigger law, cited the Center for Reproductive Rights report to show that, because six other states had them, “the trigger statute is nothing new.” Audio: Hearing on H.B. 1166, H.B. 1233, and H.B. 1249 Before the S. State Affairs Comm., 2005 Leg., 80th Sess. 00:47:30 (S.D. Feb. 23, 2005) [hereinafter *S.D. Senate Hearing*], available at <http://lightning.state.sd.us:8080/ramgen/80session/sst32hb1249a.rm> (statement of Rachel Hansen, State Director, South Dakota Right to Life); see also *S.D. House Hearing*, *supra* note 21, at 00:04:30 (statement of Rachel Hansen, State Director, South Dakota Right to Life); cf. Audio: S.D. H. Deb. 00:02:45 (Feb. 15, 2005) [hereinafter *S.D. House Debate*], available at <http://lightning.state.sd.us:8080/ramgen/80session/hou26hb1249a.rm> (statement of Rep. Joel Dykstra) (“[T]his is what’s known as a ‘trigger bill,’ and it’s a procedure that’s been followed by other states around the country . . .”). In fact, when South Dakota enacted its trigger law in 2005, it was one of a kind. The Center for Reproductive Rights recognized the difference between South Dakota’s new law and the “trigger laws” it had discussed in its report; the next edition of its report called the new law a “ban-in-waiting” to distinguish it from “trigger laws.” See THE DAY AFTER, *supra*. To clarify, what this Note calls a “trigger law,” the Center for Reproductive Rights calls a “ban-in-waiting”; what they call a “trigger law,” this Note terms a “policy statement.”

50. Freedom of Choice Act, S. 1173, 110th Cong. (2007).

51. *Id.* § 4(b). Although only Congress could statutorily protect women’s ability to have abortions on a national scale, some states have adopted versions of FOCA that do so on the state level. See THE DAY AFTER, *supra* note 49, at 20–21.

52. See S. 1173 §§ 2(8), (9), (12) (citing states’ and the Supreme Court’s efforts to curtail constitutional protection for reproductive choice and concluding that “[t]o guarantee the protections of *Roe v. Wade*, Federal legislation is necessary”).

53. FOCA somewhat resembles the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997), in which Congress sought to mandate a strict scrutiny standard of review for government action that “substantially burden[s] a person’s exercise of religion even if the burden results from a rule of general applicability . . .” *Id.* § 3(a). In *City of Boerne v. Flores*, the Court held that RFRA purported “to determine what constitutes a constitutional violation,” 521 U.S. at 519, and therefore exceeded Congress’s power to enforce rights protected by the Fourteenth Amendment. See *id.* at 536. If Congress enacted FOCA after the Supreme Court overruled *Roe*, *City of Boerne* would cast doubt on FOCA’s constitutionality. On the other hand, because *City of Boerne* was concerned primarily with Congress trumping constitutional decisions “already issued” by the Court, it may not control if Congress enacted FOCA *before* the Supreme Court’s decision overruling *Roe*. Cf. *id.* at 536 (“When the

In short, trigger laws have both substantive and trigger provisions. The substantive provisions would be struck down as unconstitutional if subject to judicial review. The trigger provisions say that the substantive provisions will not take effect until they would be upheld in court.

## II. TRIGGER LAWS AS POPULAR CONSTITUTIONALISM

Popular constitutionalism, at a minimum, questions whether our constitutional system does or should include judicial supremacy.<sup>54</sup> Judicial supremacy holds that when the Court explains its interpretation of the Constitution in an opinion, non-judicial actors—the President, Congress, state officials, and individuals—should treat the Court’s interpretation as the Constitution’s settled meaning even if their own interpretations would have differed. Briefly, judicial supremacy maintains that the Constitution means what the Court says it means.<sup>55</sup>

Some advocates of extrajudicial constitutionalism would go so far as to abandon judicial review;<sup>56</sup> others would recognize the practice of judicial review but permit parties before the Court to ignore its judgments.<sup>57</sup> Most argue more narrowly that, although parties must comply with the Court’s *judgments*,

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political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.”). Furthermore, even if FOCA exceeded Congress’s section 5 power to enforce the Fourteenth Amendment, it may well be within Congress’s power under the Commerce Clause, U.S. CONST. art. I, § 8.

54. See NATHANIEL PERSILY ET AL., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 4 (2008) (explaining that the “many strands” of popular constitutionalism “are united by a general argument that constitutional discourse ought not to be the exclusive province of judges and lawyers”); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) [hereinafter Alexander & Schauer, *Extrajudicial Interpretation*] (defending judicial supremacy from departmentalism); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000) [hereinafter Alexander & Schauer, *A Reply*] (same); see, e.g., Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 1011 (2004) (offering a “choice between popular constitutionalism and judicial supremacy”).

55. See, e.g., Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 360 (2003) (“*Precedential supremacy* means that government officials should treat settled judicial doctrine as binding precedent even when their actions are not subject to judicial review.”); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1542 (2005) (“[I]nterpretive supremacy [is] the power to resolve, once and for all, the Constitution’s meaning.”). *But see* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1031 (2004) (concluding that “it is unhelpful to define judicial supremacy as giving to courts the last word or ultimate authority to determine constitutional meaning” because “no plausible account of judicial supremacy deprives citizens of ultimate control over the meaning of the Constitution”).

56. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Critics of both Tushnet and Waldron suggest that their views are anti-constitutionalism and not just anti-judicial-review. See, e.g., Louis Michael Seidman, *Can Constitutionalism Be Leftist?*, 26 QUINNIPIAC L. REV. 557, 564–65 (2008).

57. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994). For an overview of the debate about the obligation to enforce judgments, see generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008).

the Court's *opinions*, in which the Justices explain their reasoning, bind no one.<sup>58</sup> If the Constitution provides the rule of decision, the Court interprets the Constitution, applies it to the parties' dispute, issues a final judgment establishing the binding legal obligations of the parties, and explains its judgment in a written opinion. Although the opinion might provide useful information about how the Court will rule the next time it decides a similar constitutional question, it does not require government officials and other interested observers to read the Constitution as the Court does.<sup>59</sup>

At this point, advocates of extrajudicial constitutional interpretation diverge into two categories: popular constitutionalists and departmentalists. Popular constitutionalism embraces a "romantic" view of the Constitution that distinguishes the Constitution from ordinary law.<sup>60</sup> For popular constitutionalists, "the authority of judicial decisions formally and explicitly depends on reactions from the other branches and, through them, from the public."<sup>61</sup> Some argue that the people's "right, and their responsibility, as republican citizens to say finally what the Constitution means"<sup>62</sup> calls for limiting the Court's authority to definitively interpret the Constitution; others emphasize how constitutional meaning is already shaped through dialogue between the people and the Court.<sup>63</sup> The political branches represent the possibility of "a more democratic, less crabbed and formalistic constitutionalism,"<sup>64</sup> which political actors may use to

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58. See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

59. See *id.*

60. See Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1132–33, 1157–62 (2006) (identifying popular constitutionalism with "Constitutional romanticism"). *But see* Post & Siegel, *supra* note 55, at 1034 (rejecting as a "false dichotomy" the choice between "assert[ing] popular control over the Constitution's meaning [and] endow[ing] constitutional rights with the attributes of ordinary law").

61. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 252 (2004); see also *id.* at 107 ("The assumption that final interpretive authority must rest with some branch of the government belongs to the culture of ordinary law, not to the culture of popular constitutionalism. In a world of popular constitutionalism, . . . final interpretive authority rests with the people themselves.").

62. *Id.* at 227.

63. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) [hereinafter Friedman, *Dialogue*]; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003) [hereinafter Friedman, *Mediated Popular Constitutionalism*]; Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Post & Siegel, *supra* note 55; Post & Siegel, *supra* note 12; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

Because these scholars maintain that, at least in the long run, constitutional doctrine reflects ordinary democratic politics, democracy-based arguments against judicial review appear to be based on faulty assumptions. See Friedman, *Dialogue*, *supra*, at 644 ("A judicial decision is an important word on any subject. But it is not necessarily the last word. Because the judicial word is not the last word, the countermajoritarian difficulty loses force.").

64. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 678 (2005) ("[T]he political branches have the capacity to effectuate the Constitution in ways quite distinct from the familiar, judicial version, and . . . in part because of that distinctiveness, extrajudicial constitutionalism provides a normatively attractive supplement to or substitute for judicial

guide their own action or which they may impress upon the Court.

Departmentalism—related to, but distinct from, popular constitutionalism<sup>65</sup>—shares its skepticism of judicial supremacy but differs in its conception of the Constitution's social function. Departmentalism generally takes an ordinary-law view of the Constitution, in which non-judicial actors' interpretive authority is derived from the Constitution's allocation of government functions.<sup>66</sup> Departmentalists maintain that Congress, the President, and the Court all speak with authority on constitutional meaning. Some would distribute interpretive authority to different branches for certain types of questions<sup>67</sup> or at different points in the process of lawmaking and enforcement.<sup>68</sup> Others assert each branch's equal authority to answer all questions of constitutional interpretation, with constitutional meaning developing through the interaction of the various interpreters according to the checks and balances set out in the Constitution.

Despite their differences, both departmentalism and popular constitutionalism recognize that non-judicial actors have a number of tools to bring the Court into line with their own interpretations of the Constitution.<sup>69</sup> The President might pardon individuals convicted in court or, more controversially, decline to enforce its judgments. Congress might impeach Justices, cut the Court's funding, or freeze the Justices' salaries. The political branches might limit the Court's jurisdiction, increase or decrease the number of its members, use the appointments process to alter the Court's doctrine over time, require the Justices to handle burdensome tasks other than judicial review of statutes' constitutionality, decide when and where the Court should meet, or alter the Court's procedures. The individual justices are left with little to shield them but protection against removal and salary cuts,<sup>70</sup> the good will of the political branches,<sup>71</sup> and the

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doctrines."); *see, e.g.*, TUSHNET, *supra* note 56, at 9–14 (differentiating between the “thick Constitution” enforced by the courts and the “thin Constitution” of populist constitutional law).

65. *But see* Prakash & Yoo, *supra* note 55, at 1544 (“Departmentalism . . . has no necessary relationship with popular constitutionalism.”).

66. Post & Siegel, *supra* note 55, at 1032–33 (“Most theorists of departmentalism situate their analysis in the context of separation of powers, rather than popular constitutionalism. They frame their work by asking how the constitutionally assigned functions and distinctive interpretive capacities of the three branches of the federal government should be coordinated.”).

67. *See, e.g.*, Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

68. *See, e.g.*, KRAMER, *supra* note 61, at 109 (“[T]he departmental theory made perfect sense [in the political culture of the Founders]. Each branch could express its [constitutional] views as issues came before it in the ordinary course of business: the legislature by enacting laws, the executive by vetoing them, the judiciary by reviewing them.”); *see also* AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 60–61, 239–42 (2005) (explaining that juries provide an additional layer of review).

69. *See, e.g.*, AMAR, *supra* note 68, at 212–13; KRAMER, *supra* note 61, at 249.

70. *See* U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); *see also* AMAR, *supra* note 68, at 212.

71. *See* Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1161–63 (2007) (“Historically, Congress has rarely used the bluntest weapons available to it . . .

support of the American public.<sup>72</sup>

This Part asks whether trigger laws are yet another tool of extrajudicial constitutionalism. The answer depends in part on whether we think state legislatures are capable of interpreting the Constitution. Section II.A argues that state legislatures do regularly engage in constitutional interpretation, although they lack the means available to the President and Congress to interpret the document and persuade the Court to accommodate their interpretations. That state legislatures, like other non-judicial actors, can and do interpret the Constitution does not mean, however, that trigger laws are a useful example of popular constitutionalism at work. Section II.B questions whether trigger laws accurately reflect popular preferences about constitutional meaning or demonstrate legislators' participation in constitutional interpretation.

#### A. STATE LEGISLATURES AS CONSTITUTIONAL INTERPRETERS

The nation's history calls for skepticism about state legislatures' roles as authoritative interpreters of the Constitution. Nullification—the theory that “final authority to declare laws unconstitutional . . . [is] a reserved right retained by each state”<sup>73</sup>—was one of the issues over which the Civil War was fought.<sup>74</sup> The nullifiers, arguing that states were “the final interpreters of the Constitution,” found themselves on the wrong side of both history and the war.<sup>75</sup> State resistance to the Supreme Court's interpretations of the Constitution did not fare better in the next century when Governor Orval Faubus marked his opposition to court-ordered school desegregation by barring the doorway of Little Rock's Central High School and deploying the Arkansas National Guard.<sup>76</sup> The obvious injustice of the governor's resistance emboldened the Court to respond with a powerful assertion of judicial supremacy<sup>77</sup> and burned the importance of judicial review into the memory of a generation.

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Impeachments have been few and not for judicial decisions. And as to funding, Congress has generally done well by the courts.”)

72. See Stephen Breyer, *Judicial City Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903, 903 (2007) (“[T]he judiciary is, in at least some measure, dependent on the public's fundamental acceptance of its legitimacy.”).

73. WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836*, at 159 (1992).

74. See generally *id.*

75. See Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 383 (1997) (arguing that “the Civil War itself ‘effectively invalidated such claims’” (quoting Walter F. Murphy, *Who Shall Interpret?: The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986))); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 782 (2002) (“A theory of state supremacy was extensively developed in the antebellum period, but has found few adherents since the Civil War.”).

76. For a history of these events, see Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 390–403.

77. *Cooper v. Aaron*, 358 U.S. 1 (1958); see also TUSHNET, *supra* note 56, at 8 (“The Little Rock case presented a particularly appealing setting for asserting judicial supremacy. *Brown* was unquestionably right, or so the justices and a large part of the country thought. Governor Faubus's resistance had provoked a real crisis of law and order, with white opponents of desegregation credibly threatening to

But advocates of state authority to interpret the Constitution remain.<sup>78</sup> Indeed, once one recognizes the interpretive authority of other non-judicial actors, the states follow close behind. Advocates of extrajudicial constitutional interpretation often ground their arguments in part on the fact that non-judicial actors as well as judges have taken the oath to support the Constitution.<sup>79</sup> Faithful observance of the oath by these non-judicial actors provides a bulwark against constitutional violations (when courts are unlikely to have the opportunity to review non-judicial action),<sup>80</sup> they argue, and requires independent constitutional interpretation by non-judicial actors even when the Court has already spoken (in case the Court is wrong). Like members of Congress and Executive Branch officers,<sup>81</sup> state legislators “[take] an oath to support the Constitution . . . . If legislators think the Court misinterpreted the Constitution, their oath allows them—indeed, it may *require* them—to disregard [the Court’s interpretation].”<sup>82</sup> As Gary Lawson puts it, “if departmentalists don’t talk about the states, it is probably for no better reason than that they do not want to be associated with a guy named Faubus . . . .”<sup>83</sup>

But their shared oath to support the Constitution does not mean that state legislators, Congress, and the President are all equally equipped to carry out their interpretive obligations. For several reasons, the interpretive capacity of

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inflict violence on anyone—including African-American children—who tried to desegregate the schools.”).

78. See, e.g., Interview by Katie Couric with Sarah Palin, Governor, Alaska, *CBS Evening News* (CBS television broadcast Oct. 2, 2008). Governor Palin explained her apparent support for state-based extrajudicial constitutionalism:

Palin: “I think it [the constitutionality of abortion laws] should be a states’ issue, not federal government mandating ‘yes’ or ‘no’ on such an important issue. I’m, in that sense, a federalist, where I believe that states should have more say in the laws of their lands and individual areas . . . .”

Couric: “Do you think there’s an inherent right to privacy in the Constitution?”

. . . .

Palin: “I do and I believe that individual states can best handle what the people within the different constituencies in the fifty states would like to see their will ushered in, in an issue like that.”

*Id.*

79. See, e.g., TUSHNET, *supra* note 56, at 6; see also Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 *GEO. L.J.* 385, 386 (1994) (explaining that interpretive authority extends to everyone who “exercise[s] some degree of governmental power” and swears to uphold the Constitution and acknowledging that “[t]his easily includes members of . . . state legislatures . . . .”); Prakash & Yoo, *supra* note 55, at 1556 (“The same principle is true for state executive, legislative, and judicial officials: each must interpret the Constitution in the course of performing their own constitutional responsibilities.”).

80. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 50 (1988).

81. See U.S. CONST. art. VI (“The Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”).

82. TUSHNET, *supra* note 56, at 6.

83. Gary Lawson, *Interpretive Equality as a Structural Imperative (Or “Pucker Up and Settle This!”)*, 20 *CONST. COMMENT.* 379, 384 (2003).

state legislators may be comparably lacking.<sup>84</sup> First, state legislatures lack the institutional support on which Congress and the President rely for answers to difficult legal questions. The Solicitor General and the Office of Legal Counsel advise the President on questions of constitutional meaning, and the Office of Legislative Counsel and Congressional Research Service consult with members of Congress on the constitutional implications of legislative language.<sup>85</sup> Meanwhile, legislators in most states need to work additional jobs to supplement their public salaries and have little support staff.<sup>86</sup> Without a substantial staff of legal experts, a state legislature may be less likely than the President or Congress to answer questions of constitutional law *accurately*, leading some popular constitutionalists to question the capacity of non-federal officials to authoritatively interpret the Constitution.<sup>87</sup>

The argument that state legislators lack the expertise to interpret the Constitution, however, seems to assume that extrajudicial interpreters of the Constitution approach their task the same way judges do—parsing constitutional text, structure, and tradition and filling gaps if appropriate. But popular constitutionalists do not expect extrajudicial interpreters to approach the Constitution like judges. Instead, popular constitutionalists see the Constitution as a political document, which should and does reflect popular understandings of fundamental, constitutional values. Under their definition of constitutionalism, state legislatures' inadequate support from legal experts does not affect their interpretive abilities because the Constitution is not an experts' document. Interpretive authority for popular constitutionalists instead depends in part on how well an institution reflects popular understandings of constitutional meaning—something unaffected by the absence of professional legal advisors.

Second, state legislatures are at a comparative disadvantage in an interpretive “arms race” with either political branch of the federal government.<sup>88</sup> If no single institutional interpreter has the final say on matters of constitutional meaning, each is left to assert its preferred interpretations by way of political pressure on the other institutions.<sup>89</sup> “The people . . . can elect state officials that come close to the people’s desired constitutional views, and these officials can attempt to

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84. In addition to the reasons described in the text, Professor Paulsen argues that differences in the oaths prescribed by the Constitution for the President and other government officials suggests that the President’s interpretive duty and authority are greater. See Paulsen, *supra* note 57, at 257–62.

85. *But cf.* TUSHNET, *supra* note 56, at 61–62 (suggesting that Congress lacks the Executive Branch’s institutional support for constitutional interpretation).

86. See National Conference of State Legislatures, NCSL Backgrounder: Full- and Part-Time Legislatures, [http://www.ncsl.org/programs/press/2004/backgrounder\\_fullandpart.htm](http://www.ncsl.org/programs/press/2004/backgrounder_fullandpart.htm) (last visited Oct. 11, 2008).

87. See, e.g., TUSHNET, *supra* note 56, at 54 (acknowledging that his “arguments . . . would have to be modified, and perhaps abandoned, were we to focus on city councils or even state legislatures.”).

88. *But cf.* Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1303 n.1 (2008) (suggesting that “state courts may be among the most influential” non-Article III actors in terms of urging their preferred legal views upon Article III courts).

89. See, e.g., Paulsen, *supra* note 57, at 222 (describing an “interpretive tug-of-war[.] . . . a decentralized and dynamic model of constitutional interpretation, in which the meaning of the Constitution . . .

use the states' place in our political system to influence the actions of the federal government."<sup>90</sup> Constitutional meaning becomes fixed when these checks and balances yield a state of equilibrium,<sup>91</sup> and institutions with fewer persuasive tools at their disposal will have less influence over where that meaning comes to rest.<sup>92</sup> Unfortunately for the states,

[u]nlike Congress and the president, state governments . . . have no formal say in determining the Court's general contours or in making the specific decisions about whom to put on it or pull off it. A state whose laws [a]re declared unconstitutional c[an] detour around the existing justices only by convincing the other federal branches that its grievance ha[s] merit.<sup>93</sup>

That state legislatures may be less capable of pushing their preferred interpretations means that they are *less effective* interpretive authorities. Their comparative ineffectiveness, however, does not mean they lack interpretive authority altogether.

Third, fifty independent, authoritative interpreters of the Constitution could mean interpretive anarchy. The inability of systems of popular constitutionalism and departmentalism to settle constitutional meaning with finality has been one of the most potent critiques of extrajudicial constitutional interpretation.<sup>94</sup> Some scholars generally sympathetic to extrajudicial constitutionalism appear concerned that allowing each state interpretive authority would produce too much instability in constitutional meaning.<sup>95</sup> That these scholars appear to share their critics' concerns about settlement suggests that settlement is an important function of constitutional law, even if it is not the only function.<sup>96</sup> Whether we should recognize state legislatures' interpretive authority, then, depends on settlement's importance relative to the other objectives of constitutionalism.<sup>97</sup>

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is determined, not by any single oracle, but by the interaction of competing viewpoints advanced by different interpreters representing different perspectives").

90. Prakash & Yoo, *supra* note 55, at 1557–58.

91. Paulsen, *supra* note 57, at 222.

92. Cf. Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 94 (1998) ("Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance.").

93. AMAR, *supra* note 68, at 213.

94. See generally Alexander & Schauer, *A Reply*, *supra* note 54; Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 54; Farber, *supra* note 55.

95. See Alexander & Schauer, *A Reply*, *supra* note 54, at 475–76 ("[O]ur critics are unwilling to come out strongly in support of dispersal of the interpretive authority among the 50 states . . .").

96. See, e.g., Whittington, *supra* note 75, at 786–89 ("The settlement function of the law is a valuable one, but it is not the only value that the Constitution serves."). Whittington does not appear resistant to recognizing states' interpretive authority; he concedes the value of constitutional settlement but argues that Professors Alexander and Schauer overstate its importance and the ability of the courts to settle constitutional questions while underestimating the ability of non-judicial actors to do the same. See *id.* at 788–89. For a similar critique of Alexander and Schauer, see Devins & Fisher, *supra* note 92.

97. For an argument that we should give little weight to the settlement function, see LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

Finally, some popular constitutionalists may be skeptical of state legislatures as authoritative interpreters of the United States Constitution because state legislatures do not speak for the nation as a whole.<sup>98</sup> If it is the federal Constitution we are expounding and that Constitution should reflect popular preferences, the relevant preferences are those of a national rather than local majority. Moreover, state legislators may not be as willing as the federal Executive and Legislative Branches to enforce federal constitutional norms, giving effect to parochial concerns and local prejudices over national interests reflected in the Constitution.<sup>99</sup> On the other hand, each state legislature's interpretation would apply only within the state's borders, and there may be space in our federal system to grant each state legislature "the authority to put into place, within its community, its unique interpretation of [American constitutionalism]."<sup>100</sup>

There are both historical and structural reasons to be skeptical of state legislatures' roles as constitutional interpreters. State legislatures may interpret the Constitution less successfully than Congress or the President because they lack institutional expertise and the capacity to persuade other government officials of their positions, are too numerous to contribute to a stable equilibrium in constitutional meaning, and are hindered by local biases contrary to national interests. Nevertheless, state legislators take the oath to uphold the Constitution and interpret it as a matter of course. The question remains whether trigger laws demonstrate state legislatures' constitutional interpretation in practice.

#### B. ARE TRIGGER LAWS POPULAR? CONSTITUTIONALISM?<sup>101</sup>

Trigger laws are legal oddities. They are called "laws" but are not representative of the usual products of the legislative process. How are we to understand such a departure from "law" in the ordinary sense?

Some supporters of trigger laws have aligned themselves with the leading figures of departmentalist and popular-constitutionalist accounts of the country's constitutional history, and extrajudicial constitutionalism may provide the strongest justification for trigger laws' existence. Urging South Dakota's legisla-

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98. This argument obviously does not hold for extrajudicial interpretation of state constitutions. For a discussion of popular constitutionalism limited to the state level, see Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 871-901 (1999).

99. Cf. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 322-26 (5th ed. 2003) (discussing the "parity debate" regarding state-court enforcement of federal rights (internal quotation marks omitted)).

100. See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993). Professor Kahn's article addresses the role of state courts, not legislatures, but his ideas about the nature of the constitutional enterprise still have weight once the conversation is expanded to include non-judicial interpreters.

101. The title of this section is drawn from Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing KRAMER, *supra* note 61).

ture to enact a trigger law, one pro-life advocate argued against the idea “that the legislative and executive branches of government are powerless in the face of *Roe v. Wade*”:

As Abraham Lincoln once said, a Supreme Court ruling is not a Thus-Saith-the-Lord. So while the text of this bill correctly addresses the flawed belief that a Supreme Court ruling is a Thus-Saith-the-Lord, it doesn't deny the principle, the sacred principle set forth by many of our Founders such as Alexander Hamilton, Thomas Jefferson, John Marshall, and Abraham Lincoln, who all said that all branches of all government have a duty to protect the right to life, regardless of what another branch says.<sup>102</sup>

Can trigger laws succeed as instruments of the legislative constitutionalism to which their supporters aspire? Are trigger laws effective as tools of popular constitutionalism? Enactment of trigger laws could plausibly be understood as a method of coping with the “competing commitments to the rule of law and to self-governance”<sup>103</sup> that popular constitutionalism seeks to address. Trigger laws could represent efforts to resolve those tensions by conceding judicial supremacy (to a degree),<sup>104</sup> while recognizing that the Court's interpretation of the Constitution might change and encouraging changes that will bring constitutional law into line with the preferences of the state's voters.

But there are reasons to think that trigger laws are poor examples of popular constitutionalism at work. First, trigger laws have questionable *democratic* legitimacy. The shadow cast by the unconstitutionality of their substantive provisions distorts the political processes that usually characterize democratic lawmaking on controversial issues of public interest. Second, trigger laws may not reflect *constitutionalism* at all. Advocates of constitutionalism outside the courts differentiate constitutional politics from ordinary politics by emphasizing how non-judicial actors are capable of interpreting the Constitution and how public deliberation over issues fundamental to national self-understanding shapes the Court's vision of the Constitution. However, it is far from clear that the legislators voting on trigger laws are engaging in constitutional interpretation, and because trigger laws' constitutionality cannot be litigated, they do not permit judicial-political dialogue about constitutional meaning.

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102. *S.D. House Hearing*, *supra* note 21, at 00:09:14–00:10:01 (statement of Rob Regier, Executive Director, South Dakota Family Policy Council). The reference is to Lincoln's first debate with Stephen Douglas. See First Lincoln-Douglas Debate, Ottawa, Illinois (Aug. 21, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832–1858, at 495, 525 (Don E. Fehrenbacher ed., 1989).

103. Post & Siegel, *supra* note 12, at 375; see also *id.* at 376 (“Democratic constitutionalism describes how our constitutional order actually negotiates the tension between the rule of law and self-governance.”).

104. Trigger laws are more deferential to the Court than “judgment supremacy” would require because they assume that the Court's opinions authoritatively state current constitutional law.

## 1. Democracy Problems

To function as instruments of majoritarian, popular constitutionalism, legislative acts must reflect the constitutional views of the majority of a state's citizens.<sup>105</sup> Assuming that a state's population does hold well-defined constitutional views and that legislatures are generally capable of making law that reflects those constitutional preferences,<sup>106</sup> do trigger laws reflect the majority's preferred constitutional interpretations?

Because of knotty complexities regarding how legislators should weigh voter preferences<sup>107</sup> and the extent to which voters actually communicate their preferences to legislators, whether a legislative outcome is properly "democratic" is a hard, if not unanswerable, question. Those complexities need not be untangled to consider the democratic merit of trigger laws. To see if trigger laws are meaningfully democratic, we should ask whether the legislative process surrounding their enactment deviates from what we would expect if the legislature were considering a substantively identical statute effective upon adoption instead of contingent upon some possible future event. If we accept ordinary lawmaking as democratically legitimate, material departures from the ordinary process raise questions about the resulting legislation's democratic legitimacy.<sup>108</sup>

*a. Constituent Preferences.* Polling data suggest that a majority of South Dakotans would not support their state's trigger law's substantive provision if it had immediate effect. The South Dakota trigger law bans abortions except when "necessary to preserve the life of the pregnant female."<sup>109</sup> Some polls taken prior to the law's enactment in 2005 indicated that 75–80% of the state's citizens favored exceptions for pregnancies due to rape or incest.<sup>110</sup>

The data are less clear about whether most South Dakotans approve of a trigger law. Proponents of the trigger bill presented a poll showing that 69% of the state wanted abortions to become illegal automatically if *Roe* were over-

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105. Departmentalists would not consider trigger laws' failure to carry the support of a majority as undermining their aspirations to legislative constitutionalism.

106. Scholars disagree about whether "the people" ever maintain views on constitutional meaning. Neal Devins, for example, argues that they do not. See Neal Devins, *The D'oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1335, 1340–41 (2007) (supporting his position with data indicating that "while only one in four Americans can name more than one of the five freedoms guaranteed by the First Amendment, more than half can name at least two members of the Simpsons cartoon family"); Neal Devins, *Tom Delay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055, 1056–59 (2006) [hereinafter Devins, *Tom Delay*] ("Congress and the American people care about outcomes, not constitutional interpretation.").

107. See Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 796 (1999) (arguing that democracy is an essentially contested concept and that pluralist conceptions of democracy are faced with the difficulty of deciding whether each voter's preference should be weighed equally or by taking into account the intensity her preference).

108. Of course, those departures could also mean that the resulting legislation reflects majoritarian preferences better than ordinary lawmaking.

109. S.D. CODIFIED LAWS § 22-17-5.1 (2006).

110. S.D. *House Hearing*, *supra* note 21, at 00:12:07 (statement of Kate Looby, State Director, Planned Parenthood of South Dakota).

ruled.<sup>111</sup> Because the proponents' poll apparently did not separately test whether respondents preferred an abortion ban without rape and incest exceptions in the trigger law, its data may overestimate how many citizens favor such a strict ban. On the other hand, the polls presented by the trigger law's opponents apparently did not ask respondents to project their preferences in a post-*Roe* world, and it seems plausible that some who do not currently favor an abortion ban without exceptions would support the same ban should *Roe* be overruled.<sup>112</sup> Although the polls do not clearly show whether most citizens approve of the trigger law, the data do suggest that most would oppose such a law if it took immediate effect.

The opponents' polling data are confirmed by two referenda in which South Dakotan voters rejected abortion bans that would have become effective immediately. Hoping that a reconstituted Supreme Court would uphold the law, the legislature in 2006 enacted an effective abortion ban that, like the state's trigger law, excepted only abortions necessary to protect the mother's life.<sup>113</sup> Pro-choice advocates successfully petitioned to place the legislation on the ballot in November 2006,<sup>114</sup> providing a sort of popular review of the law. South Dakotans voted to overturn the law by a twelve-point margin,<sup>115</sup> and in 2008, they rejected a second abortion ban via referendum.<sup>116</sup> Because polling showed that the 2006 measure would have passed if it had included such exceptions,<sup>117</sup> the 2008 ballot initiative included exceptions for cases of incest, rape, and to preserve the life or health of the pregnant woman, earning it the opposition of some pro-lifers, who preferred the trigger law to a less-restrictive, but effective, ban.<sup>118</sup> As with the 2006 referendum, voters in the 2008 election rejected the proposed abortion ban by a double-digit margin.<sup>119</sup>

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111. *S.D. Senate Hearing, supra* note 49, at 00:48:05 (statement of Rachel Hansen, State Director, South Dakota Right to Life).

112. I doubt that a 40–50% swing between the two sides' polling data can be explained solely by the Supreme Court's position on such a law's constitutionality. It is hard to believe that the moral preferences of such a large part of the population would track to what is or is not legally permitted.

113. H.B. 1215, 81st Legis. Assem., Reg. Sess. (S.D. 2006).

114. NARAL PRO-CHOICE AM. & NARAL PRO-CHOICE AM. FOUND., *BEHIND THE BAN: POLITICS AND SOUTH DAKOTA'S ABORTION BAN 12–13* (2007).

115. *See id.* at 13.

116. Terry Woster, *Abortion Ban Rejection Might Leave Supporters with Nowhere To Go*, ARGUS LEADER (Sioux Falls, S.D.), Nov. 5, 2008, available at <http://www.argusleader.com/article/20081105/NEWS/811050301/1001/news>.

117. *See* Glenn Kessler, *California Voters Narrowly Approve Same-Sex Marriage Ban*, WASH. POST, Nov. 6, 2008, at A44.

118. *See* *SDRTL Statement in Opposition to the 2008 Proposed Abortion Ban Initiative*, LIFEFACTS (S.D. Right to Life, Pierre, S.D.), Spring 2008, at 1, available at [http://www.sdrf.org/pdfs/March\\_Lifefacts.pdf](http://www.sdrf.org/pdfs/March_Lifefacts.pdf).

119. *See* Woster, *supra* note 116. Public opposition to an effective abortion ban may have reflected unwillingness to shoulder the costs of defending its constitutionality. Utah created an "Abortion Litigation Trust Account" through which pro-life groups and individuals can fund the state's defense of a law that "challenges the legal concept that a woman has a constitutional right to an abortion," defraying the cost to taxpayers generally. *See* Abortion Litigation Trust Account Amendments, 2009 Utah Laws ch. 43, § 4(a) (amending UTAH CODE ANN. § 76-7-317.1 (2008)).

Although polling data and the subsequent popular rejection of enforceable abortion bans suggest that the 2005 trigger law might have lacked the support of a popular majority, South Dakota's legislators were quick to pass the legislation without much discussion of its substantive provisions. When a senate committee held a joint hearing on the trigger bill and two other abortion-related bills, senators heard approximately an hour and a half of witness testimony, roughly five minutes of which addressed the trigger bill,<sup>120</sup> and the committee chairman noted that "of the three bills, [the trigger bill] was the one that got the shortest amount of debate time."<sup>121</sup> When other legislators proposed amendments to provide exceptions for women's health or for cases of incest and rape—amendments that arguably would have won the laws the support of a majority of the state's citizens—sponsors suggested that the deferred effective date made it unnecessary to consider the law's details. "Let's stick to the real issue here," urged one house sponsor, "and what the bill does, it's a trigger mechanism in case [*Roe*] v. *Wade* is turned over. Beyond that, *we'll have the discussion another time*, but let's not get distracted . . . ."<sup>122</sup> The contrast between South Dakota's experience with abortion trigger laws and effective abortion bans suggests that the democratic process treats the two differently.

*b. Interest Group Involvement.* The involvement of interest groups provides another measure of whether the democratic process treats trigger laws the same as effective laws. If groups that would otherwise be active participants in the legislative debate instead sit on the sidelines because a trigger law would have no immediate effect, the ordinary lawmaking process is distorted. Abortion trigger bills, in the few states where legislatures have considered them, do appear to have caused such distortion. Although in every state a number of interest groups are heavily engaged on both sides of the abortion issue, neither pro-life nor pro-choice groups have prioritized trigger bills pending before state legislatures.<sup>123</sup> Again, South Dakota provides a case study.

South Dakota Right to Life (SDRTL) drafted the state's trigger law,<sup>124</sup> was its main proponent, and later called it "the most important piece of pro-life

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120. See *S.D. Senate Hearing*, *supra* note 49, at 00:12:00–01:39:00.

121. *Id.* at 01:49:43 (statement of Eric Bogue, Chairman, South Dakota S. State Affairs Comm.).

122. See *S.D. House Debate*, *supra* note 49, at 00:36:07 (statement of Rep. Larry Rhoden) (emphasis added).

123. See *supra* note 10 and accompanying text. Pro-choice advocates' non-involvement may reflect a preference for challenging state-level legislation in court instead of in the legislatures. See Scott, *supra* note 44, at 369 ("Since *Roe*, anti-choice forces have worked hard to pass anti-abortion statutes, while pro-choice advocates have largely ignored that aspect of the political process.").

124. See *S.D. House Hearing*, *supra* note 21, at 00:25:21–00:25:39 (statement of Rep. Larry Rhoden, Chair, South Dakota H. State Affairs Comm.) ("I believe your organization [SDRTL] was . . . the one that helped craft a lot of the language."); *S.D. Senate Hearing*, *supra* note 49, at 00:47:25 (statement of Rachel Hansen, State Director, South Dakota Right to Life) ("[W]e were involved in the drafting . . . .").

legislation passed in the state in recent years.”<sup>125</sup> Curiously, however, the newsletter the group sent its members within weeks of the bill being introduced did not mention the trigger law; instead the newsletter’s preview of upcoming state legislation highlighted SDRTL’s efforts to “tighten up laws that are already in effect, namely Living Will laws, fetal homicide laws, . . . those that protect vulnerable young women from being unjustly influenced to have an abortion[, and fetal pain legislation.”<sup>126</sup> Why the group would not tout its proposed legislation to its own members is unclear. Perhaps SDRTL did not decide to propose the bill until very shortly before doing so. Perhaps SDRTL did not want to call attention to the bill because it suspected a large part of the state’s population opposed an abortion ban without exceptions for cases of rape or incest or to preserve the pregnant woman’s health. Perhaps the omission was simply an oversight due to poor communication between the group’s lobbyists and the publishers of the newsletter. Each possibility suggests that SDRTL did not highly prioritize the trigger law and did not fully mobilize its members to support the bill.

The legislative hearings on the South Dakota trigger bill also suggest that it was not the top priority of pro-life organizations other than SDRTL. At the house committee hearing, SDRTL described how trigger laws work and their history in South Dakota;<sup>127</sup> three other groups noted their support for the bill but added little to the discussion.<sup>128</sup> The senate committee that considered the trigger bill held a consolidated hearing for the trigger bill and two other abortion-related bills (one specifying the nature of informed consent for abortion malpractice claims, the other establishing an abortion task force).<sup>129</sup> Of the eleven non-legislator witnesses that testified in favor of the abortion bills, only one—the witness for SDRTL—specifically addressed the trigger law,<sup>130</sup> and another declined to answer a question about the trigger law, noting that he had prepared to address only the bill relating to informed consent for abortions.<sup>131</sup>

Pro-choice organizations were even less engaged in their opposition to the South Dakota trigger law. At the senate committee hearing, pro-choice witnesses almost entirely ignored the trigger bill, testifying mainly against the informed consent bill. The witness for ACLU of the Dakotas revealed her organization’s priorities when she closed her testimony by stating, “we would

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125. See *Trigger Bills & Ultrasounds: Pro-abortionists’ Biggest Fears*, LIFEFACTS (S.D. Right to Life, Pierre, S.D.), Autumn 2007, at 1, available at [http://www.sdrl.org/pdfs/Fall07\\_LifeFacts.pdf](http://www.sdrl.org/pdfs/Fall07_LifeFacts.pdf).

126. See *Several Pro-Life Bills Introduced*, LIFEFACTS (S.D. Right to Life, Pierre, S.D.), January 2005, at 2, available at [http://www.sdrl.org/pdfs/LifeFacts\\_Jan2005.pdf](http://www.sdrl.org/pdfs/LifeFacts_Jan2005.pdf).

127. See *S.D. House Hearing*, *supra* note 21, at 00:04:09–00:08:03 (statement of Rachel Hansen, State Director, South Dakota Right to Life).

128. *Id.* at 00:08:22 (statement of Rita Houglum, South Dakota Eagle Forum); *id.* at 00:08:45 (statement of Rob Regier, Executive Director, South Dakota Family Policy Council); *id.* at 00:10:27 (statement of Travis Benson, Lobbyist, Catholic Diocese of Sioux Falls).

129. See *S.D. Senate Hearing*, *supra* note 49.

130. See *id.* at 00:12:40–00:52:00.

131. See *id.* at 01:44:10 (statement of Harold J. Cassidy, Attorney, Harold J. Cassidy & Associates).

urge you to vote against all three of these bills. Well, certainly [House Bill] 1166 [the informed consent bill].”<sup>132</sup> Other witnesses expressed frustration at having to address the subject at all, suggesting that “it’s a waste of time for the legislature to try and pass a law that goes against the Constitution of the United States”<sup>133</sup> and wondering aloud “why we’re discussing this bill now rather than waiting for the time in which states are allowed to regulate.”<sup>134</sup>

The evidence from South Dakota is clearer than that of other states. In North Dakota, four pro-life groups and seven pro-choice groups offered written testimony at legislative hearings on the trigger law, with most of the testimony addressing the groups’ general policy positions rather than the trigger law specifically.<sup>135</sup> In Louisiana, nearly one hundred members of the public attended the state senate’s committee hearing on the trigger law.<sup>136</sup> That large number may be misleading, however, because when the committee met, the bill under discussion was not a trigger law but an outright ban;<sup>137</sup> at the subsequent house committee hearing, the audience was two-thirds that size.<sup>138</sup> As in North Dakota, most witnesses (and particularly those testifying in favor of the bill) stated general positions on the abortion issue and did not address the specifics of the trigger law.<sup>139</sup>

Evidence from the states that have enacted abortion trigger laws suggests that interest groups are not bringing to bear on the legislative process all the resources they would deploy were an *effective* statute on the table. Some citizens who would otherwise be interested in an *effective* law criminalizing abortion do not participate in public deliberation about trigger laws. The unconstitutionality of trigger laws’ substantive provisions means that advocates who would otherwise support or oppose the law instead stay out of the legislative process.<sup>140</sup>

Although some legislators evidently see political benefit in introducing trigger-law bills, interest groups and individual citizens are not particularly interested in laws that individuals on both sides of the issue doubt will ever become

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132. *See id.* at 01:12:30 (statement of Jennifer Ring, ACLU of the Dakotas).

133. *Id.* at 00:58:40 (statement of Matt Barker, Physician).

134. *S.D. House Hearing, supra* note 21, at 00:14:38 (statement of Kate Looby, State Director, Planned Parenthood of South Dakota).

135. *See N.D. House Hearing I, supra* note 36 (prepared testimony); *N.D. Senate Hearing I, supra* note 36 (prepared testimony).

136. *Hearing on S.B. 33 Before the S. Comm. on Health and Welfare*, 2006 Reg. Sess. 2–4 (La. Apr. 19, 2006) [hereinafter *La. Senate Hearing*] (on file with Louisiana Senate Docket).

137. *See id.* at 6 (statement of Sen. Nevers) (introducing amendment to include trigger provision).

138. *See Hearing on S.B. 33 Before the H. Comm. on Administration of Criminal Justice*, 2006 Reg. Sess. 10–14 (La. May 17, 2006) [hereinafter *La. House Hearing*] (on file with Louisiana Senate Docket).

139. *See id.*; *La. Senate Hearing, supra* note 136.

140. *Cf. Treanor & Sperling, supra* note 44, at 1917–24 (discussing how a statute’s unconstitutionality affects efforts to repeal it or re-enact similar legislation).

effective.<sup>141</sup> Alexander Bickel wrote that “[w]hen the law is consistently not enforced, the chance of mustering opposition sufficient to move the legislature [to rescind it] is reduced to the vanishing point . . . . The unenforced statute is not, in the normal way, a continuing reflection of the balance of political pressures.”<sup>142</sup> The same can be said of laws that the population expects never to be enforced, only no time must pass before such laws fail to represent “the balance of political pressures.” Public indifference to trigger laws leaves observers with little indication of whether most of a state’s population would approve of identical laws without the trigger provisions. That trigger laws are enacted against a backdrop different from that which usually accompanies democratic lawmaking on controversial issues casts doubt on whether they reflect democratic decisionmaking.

## 2. Trigger Laws as Legislative Constitutionalism

A state legislature’s disapproval of the Court’s interpretation of the Constitution may reflect either its independent “judgment about constitutional meaning” or merely “some kind of policy-driven, constitution-blind” opposition.<sup>143</sup> How are we to tell the difference?

Advocates of constitutionalism outside the courts have suggested two ways to distinguish constitutionalism from ordinary politics. Departmentalists emphasize the duty of non-judicial actors to interpret and obey the Constitution independently of how the courts would enforce it;<sup>144</sup> how those actors and the courts exchange ideas about constitutional meaning is at most a secondary concern. Popular constitutionalists typically maintain that ordinary people hold beliefs so fundamental as to be constitutional and that constitutional law is determined by a dialogic relationship between the people’s views and the law articulated by courts;<sup>145</sup> their scholarship often focuses on the complex interactions through which non-judicial actors infuse the constitutional doctrine articu-

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141. See, e.g., Michael Paulson, *As Abortion Foes Grow More Intense, A New View Surfaces*, BOSTON GLOBE, Oct. 30, 2008, at A1 (“‘The banning-abortion position, conservatives will admit, is not a realistic one in this country—it’s never going to happen, and they admit it’s not going to happen,’ said Jim Wallis, a leading progressive evangelical.”); Judy Peres, *States Set Stage for Bans on Abortion*, CHI. TRIB., June 12, 2006, § 1, at 1 (“Although many in the anti-abortion community consider [a more favorable Supreme Court] a long shot, they nevertheless are preparing for a day when *Roe* is no longer in force.”).

142. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961).

143. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 207 (2007).

144. See, e.g., *supra* notes 78–83 and accompanying text; *infra* notes 206–08 and accompanying text.

145. See, e.g., Post & Siegel, *supra* note 55, at 1038 (“We regard the tension between popular constitutionalism and judicial supremacy as generative; the fundamental constitutional beliefs of the American people are informed and sustained by the constitutional law announced by courts, just as that law is informed and sustained by the fundamental constitutional beliefs of Americans.”).

lated by the courts with those fundamental beliefs.<sup>146</sup>

Trigger laws are consistent with departmentalism to the extent that lawmakers back them with an interpretation of the Constitution that justifies their disregard of the Court's holdings. The legislative histories of the abortion trigger laws provide mixed evidence: supporters of the trigger laws rarely mention the Constitution but do sometimes articulate a constitutional vision to bolster their arguments. Instead, they argue from their deeply felt convictions that abortion is a moral wrong,<sup>147</sup> that the state should adopt pro-life policies,<sup>148</sup> and that their opposition to abortion is in a sense validated by statutory codification, even if the law cannot be enforced.<sup>149</sup> One North Dakotan pled, "We need pro-life legislation"<sup>150</sup>—apparently for the sake of the legislation itself, not for any effect it might have outside the statute books. These non-constitutional arguments reflect trigger laws' implicit concession that the Court is the final arbiter of constitutional meaning, leaving legislators little reason to "think constitutionally."<sup>151</sup> As a general matter, lawmakers rarely see the need to independently assess legislation's constitutionality when they know the courts will have the last word.<sup>152</sup> With trigger bills, legislators have even less incentive to do so. Because they already know that courts would hold the substantive provisions unconstitutional, they have little reason to discuss whether there is any interpretation of the Constitution under which the law could be sustained.

At least some legislators, however, have articulated constitutional arguments in favor of trigger laws. The two leading arguments both date back to the

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146. See sources cited *supra* note 63. Extrajudicial *interpretation* of the Constitution may be a preliminary step before this dialogue with the courts takes place.

147. See, e.g., Letter from James Kerzman, N.D. Representative, to Members of the N.D. Senate Judiciary Comm. (Mar. 13, 2007) (on file with author) ("I firmly believe that life begins at conception . . . . I would be neglecting my duty if I did not take a stand on an issue that I feel so strongly about.").

148. See, e.g., *N.D. Conf. Comm. Minutes II*, *supra* note 36, at 1–2 (statement of Sen. Erbele) (arguing that the trigger law is "a way of making a statement that we are pro-life here in this state" but pushing the legislature to go further "than just doing what is a political-type statement"); *N.D. Senate Hearing I*, *supra* note 36, at 3 (statement of Stacy Pflieger, Legislative Director, North Dakota Right to Life) ("This gives us the opportunity to be proactive, stating that ND is a pro[-]life state.").

149. See, e.g., *N.D. Senate Hearing I*, *supra* note 36, at 3 (statement of Mrs. Gary Zentz, "Mother from Bismarck").

150. *Id.*

151. Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 606 (1983).

152. *Cf. id.* at 606–10 ("Both institutionally and politically, Congress is designed to pass over the constitutional questions, leaving the hard decisions to the courts."). Although Judge Mikva argues that judicial review should be maintained in part *because* Congress is chronically incapable of adequate constitutional interpretation, *id.* at 610, one of the oldest lines of argument against judicial review is that it *causes* Congress to disregard the Constitution. See JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 9–10 (Cambridge, Mass., Univ. Press 1893); see also TUSHNET, *supra* note 56, at 55, 57–58 (reprising Thayer's arguments and arguing that Judge Mikva can describe the legislators' constitutional irresponsibility only "*because* legislators act in the court's shadow").

earliest state opposition to *Roe*.<sup>153</sup> The first argument, invoking federalism, is that *Roe v. Wade* tramples on state sovereignty.<sup>154</sup> The second argument is that abortion bans are constitutionally required because the fetus is a person<sup>155</sup> and “equal protection” thus demands that abortion be criminalized.<sup>156</sup> Both arguments are broader than the more common criticism that *Roe* identifies a right where the Constitution is silent,<sup>157</sup> and both would require rejecting more of our constitutional tradition than *Roe v. Wade*. To the extent that the states-rights argument would also preclude Congress from limiting states’ power to regulate abortion (proponents of the federalism argument are often unclear on this point), it takes an unusually narrow view of congressional authority and an unusually broad view of federalism. Likewise, the equal-protection argument suggests disagreement not only with *Roe* but also the *Civil Rights Cases*, which held that the Equal Protection Clause restricts only state action, not that of private parties such as abortion providers.<sup>158</sup> Moreover, if legislators read the Equal Protection Clause to require legislation criminalizing abortion, then they ought to explain why trigger laws satisfy that constitutional requirement and why they too do not provide fetuses unconstitutionally insufficient protec-

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153. See Wasserman, *supra* note 13, at 238 n.12 (citing proposed amendments to the United States and Hawaii constitutions that relied on a personhood/equal-protection argument); *id.* at 240–41 n.27 (citing the Nebraska legislature’s findings that *Roe* was a “legislative intrusion” by the Court upon the states).

154. See, e.g., *S.D. Senate Hearing*, *supra* note 49, at 00:09:25 (statement of Sen. Tom Hansen); Audio: South Dakota S. Deb. 00:00:45 (S.D. Feb. 28, 2005) [hereinafter *S.D. Senate Debate*], available at <http://lightning.state.sd.us:8080/ramgen/80session/sen35hb1249a.rm> (statement of Sen. Tom Hansen); cf. Palin, *supra* note 78.

155. See *S.D. House Hearing*, *supra* note 21, at 00:02:54 (statement of Rep. Joel Dykstra, Vice-Chair, H. State Affairs Comm.) (“[T]he day will come when the constitutional process will work as it has in the past . . . so that it will be recognized that the unborn child is a person and that the Constitution extends to that person . . .”); see also *S.D. Senate Hearing*, *supra* note 49, at 00:48:45 (statement of Rep. Joel Dykstra, Vice-Chair, H. State Affairs Comm.) (explaining that enacting the trigger law means “essentially recognizing the personhood of the unborn child”).

156. See *S.D. Senate Hearing*, *supra* note 49, at 00:48:48 (statement of Rep. Joel Dykstra, Vice-Chair, H. State Affairs Comm.) (“This is a bill about equal protection. We already have statutes which protect unborn children from attack by any person other than their mother and her doctor . . . . So basically all we’re doing is extending that protection under the law.”); see also *id.* at 01:51:28 (statement of Rep. Joel Dykstra, Vice-Chair, H. State Affairs Comm.) (referencing the “equal protection of all persons”); *La. House Hearing*, *supra* note 138, at 6 (statement of William Maestri, Priest, La. Catholic Conf.) (describing the “Right to Life” as “the most basic human[,] civil[,] and constitutional right”); *id.* at 7 (statement of Calvin Henson, Founder, Crime Fighters Coalition of La.) (invoking the Bill of Rights and the Constitution); *N.D. House Hearing I*, *supra* note 36, at 4–5 (statement of Martin Wiesznecki) (invoking the Fourteenth Amendment).

157. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”).

158. See *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883).

tion.<sup>159</sup>

Legislators' failure to grapple with the broader constitutional questions raised by their arguments—and the failure of almost all legislators deliberating over trigger bills to discuss their constitutionality at all—calls into question the seriousness of the constitutional inquiry undertaken by legislatures enacting trigger laws. The legislative history of South Dakota's trigger law indicates that lawmakers there were anything but eager to engage in serious discussion about the bill's constitutionality. The law's senate sponsor captured the legislative mood when he advocated passage of the bill by twice noting that “we have not spent an excessive amount of legislative time on it”<sup>160</sup>—an odd argument to make in support of a piece of legislation—and discouraged discussion of the law's substantive provisions by emphasizing, “It is a very simple bill. It actually does nothing today.”<sup>161</sup> That this senator was one of the few who offered any constitutional justification for trigger laws suggests the superficiality of legislators' constitutional deliberation when the laws at issue will not be reviewed by a court and do not affect the lives of today's voters.

Trigger laws also do not fit the popular constitutionalist model of extrajudicial constitutionalism. If trigger laws are an effective medium for dialogue between state legislatures (or the people represented by them) and the Court, then we should expect trigger laws to further the development of constitutional law as “[d]emocratic politics . . . shapes the institution of judicial review.”<sup>162</sup> If, however, trigger laws do not engage the court in doctrinal dialogue with the legislature, then there is little to be said for them as instruments of popular constitutionalism.

Because trigger laws are immune to judicial review, they do not enable non-judicial actors to engage the courts in a conversation about fundamental values and constitutional meaning. Trigger laws are not effective as law, suggesting that potential plaintiffs almost certainly would lack standing to challenge their constitutionality in court.<sup>163</sup> To foster a dialogue with the courts, state

159. Some pro-lifers have raised this criticism. *See, e.g., N.D. House Hearing I, supra* note 36, at 4–5 (statement of Martin Wisznecki) (arguing that the trigger law's failure to punish women who have abortions violates the Fourteenth Amendment rights of fetuses).

160. *S.D. Senate Hearing, supra* note 49, at 00:11:35 (statement of Sen. Tom Hansen); *S.D. Senate Debate, supra* note 154, at 00:02:30 (statement of Sen. Tom Hansen).

161. *S.D. Senate Hearing, supra* note 49, at 00:09:57 (statement of Sen. Tom Hansen); *S.D. Senate Debate, supra* note 154, at 00:01:08 (statement of Sen. Tom Hansen).

162. Post & Siegel, *supra* note 12, at 399.

163. To satisfy Article III's case-or-controversy requirement, plaintiffs challenging the enforcement of state criminal laws generally need to show a threat of prosecution “of sufficient immediacy and reality” to warrant equitable relief. *Steffel v. Thompson*, 415 U.S. 452, 459–60 (1974).

Abortion trigger laws are particularly unlikely to produce constitutional rulings given the Court's inclination to consider the constitutionality of abortion laws only as-applied. *See, e.g., Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 167 (2007) (“[F]acial attacks [on the constitutionality of the Partial-Birth Abortion Ban Act of 2003] should not have been entertained in the first instance . . . [T]he proper means to consider exceptions is by as-applied challenge.”); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–31 (2006) (remanding for consideration of whether enjoining

legislatures would need to prompt “test cases” by enacting *effective* abortion bans. Courts could entertain challenges to those statutes, and the test cases would provide courts opportunities to incrementally develop the applicable constitutional law or overrule precedent. Trigger laws provide no such opportunity, and that is perhaps their point.<sup>164</sup> Following the Supreme Court’s decision in *Gonzales v. Carhart (Carhart II)*,<sup>165</sup> leading pro-life lawyers concluded that the Court was unlikely to uphold a ban on abortion and cautioned state-based pro-life advocates against encouraging the passage of abortion bans. Bringing a test case would result in “yet another . . . decision declaring that state law on abortion is superseded by the federal constitution,” they cautioned their colleagues.<sup>166</sup> If pro-life advocates are concerned by the prospect of an unsuccessful test case, trigger laws’ immunity from judicial review is a comparative advantage. In this light, trigger laws are not a means of engaging the Court in dialogue about constitutional meaning but a way to enact preferred legislation *without* engaging in that dialogue. Far from beginning a conversation with the courts, trigger laws provide a way for pro-life advocates to end the conversation on favorable terms.

### III. TRIGGER LAWS AND THE RULE OF LAW

Even if one accepts trigger laws as useful and appropriate tools for advancing popular understandings of constitutional meaning, responsiveness to the public will does not reflect all that is good in a constitutional democracy. The democratic values advanced by popular constitutionalism may conflict with other values that one hopes to find in a legal system,<sup>167</sup> and in particular values associated with the Rule of Law.<sup>168</sup>

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only the unconstitutional applications of a state’s abortion law would be consistent with legislative intent).

164. See Letter from Kerzman, *supra* note 147 (“[T]his chapter would not tie the State or supporting organization[s] into lengthy, possib[ly] expensive litigation since it would not take effect until or if the [U.S.] Supreme Court reverses its decision.”). Some hard-line pro-life advocates oppose trigger laws for precisely this reason. See, e.g., *N.D. House Hearing I*, *supra* note 36, at 4 (statement of Martin Wisecznecki) (“The problem with the trigger bill is it’s basically cowardly. It says let somebody get the law change[d] and we’ll just follow behind. The trigger will never be pulled if no state ever challenges *Roe v. Wade*, because there will [be] no mechanism by which the Supreme Court can ever reverse itself, unless it has [a] law that directly confronts the existing situation.”).

165. 550 U.S. 124 (2007).

166. David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 S. CT. REV. 1, 38 (quoting James Bopp, Jr. and Richard Coleson).

167. See, e.g., Seidman, *supra* note 56, at 565 (arguing of Mark Tushnet’s popular constitutionalism that “[t]o the extent that it constrains [political actors], it is not populist, and to the extent that it does not constrain [them], it is not leftist”).

168. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 104 (2004); cf. JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 211 (1979) (“[T]he rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”). Theories of popular constitutionalism struggle to reconcile Rule of Law and democratic values. See, e.g., Post &

Rule of Law is a slippery concept,<sup>169</sup> but “[r]espect for the Rule of Law is central to our [American] political and rhetorical traditions, possibly even to our sense of national identity.”<sup>170</sup> Rule-of-Law values sometimes find themselves in conflict,<sup>171</sup> and individuals thinking about the Rule of Law bundle those values in different ways. But while we sometimes disagree about what it requires in a given situation,<sup>172</sup> the Rule of Law remains a useful framework for discussing the merits and demerits of specific legal regimes.<sup>173</sup>

Lawyers’ understanding of the Rule of Law often begins with Lon Fuller’s allegory of King Rex, a legislator so inept that he fails to make law in eight different ways.<sup>174</sup> King Rex’s failures are due to his violation of Fuller’s eight tenets of the Rule of Law: generality; publicity; prospectivity; clarity; consistency with other laws; capability of being obeyed; stability over time; and congruity between announcement and enforcement.<sup>175</sup>

Trigger laws are at odds with a number of these elements of the Rule of Law. First, and most clearly, trigger laws are not effective as law. Their voidness is contrary to the Rule-of-Law principle that “[t]he law should actually guide people.”<sup>176</sup> Second, trigger laws might misfire—they might take effect even though the Supreme Court has not overruled itself and is not likely to do so. Misfiring produces inconsistency between the commands of the state legislature (or attorney general) and the Court, which can only be resolved by the low-level state officials charged with applying the statute. Faced with obeying either the legislature’s command or the constitutional doctrine articulated by the Court,

Siegel, *supra* note 55, at 1029 (“The question we pursue, therefore, is how the nation can strike a viable balance between the rule of law and the people’s authority to speak to issues of constitutional meaning.”).

169. *E.g.*, Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7 (1997) (“[T]he ‘true,’ ‘best,’ or ‘preferred’ meaning of the Rule of Law depends on the resolution of contestable normative issues; disagreements are therefore to be expected.”).

170. *Id.* at 3; *see also* TAMANAHA, *supra* note 168, at 1–2 (“[T]here appears to be widespread agreement, traversing all fault lines . . . that the ‘rule of law’ is good for everyone. Among Western states this belief is orthodoxy.”).

171. *Cf.* LON L. FULLER, THE MORALITY OF LAW 45 (rev. ed. 1969) (“[A]ntinomies may arise within the internal morality of law itself. . . . [T]he various desiderata which go to make up that morality may at times come into opposition with one another.”); RAZ, *supra* note 168, at 214 (suggesting that the Rule of Law eventually “came to signify all the virtues of the state”); TAMANAHA, *supra* note 168, at 113 (“The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.”).

172. Fallon, *supra* note 169, at 5 (“[I]n contemporary constitutional discourse it is by no means anomalous to find competing Rule-of-Law claims arrayed against each other.” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992))).

173. *Id.* at 56 (concluding that “[i]nvocations of the Rule of Law are sufficiently meaningful to deserve attention” even though the concept carries multiple, sometimes contradictory, meanings).

174. *See* FULLER, *supra* note 171, at 33–40.

175. *Id.* at 39. Professor Fallon identifies “five elements that constitute the Rule of Law,” Fallon, *supra* note 169, at 8–9, “differ[ing] in detail, but . . . in spirit consistent with, Lon Fuller’s account . . . .” *Id.* at 8 n.27.

176. Fallon, *supra* note 169, at 8.

they must make ad hoc decisions about which law to apply. Individuals subject to those officials' authority will not know in advance how their cases will be treated. Third, trigger laws have a complicated relationship with the Rule-of-Law principle that law should be stable over time, but the two are not necessarily in conflict.

#### A. EFFICACY

Because trigger laws' substantive commands are not enforced, they conflict with the Rule-of-Law principles "that people should be ruled by the law and obey it"<sup>177</sup> and that "[t]he law should actually guide people."<sup>178</sup> To serve its proper social function, law must be *effective* in guiding the conduct of individuals.

Unenforced laws are unsuccessful as law because people are unlikely to obey them.<sup>179</sup> Oliver Wendell Holmes captured the non-legal character of unenforced law with his injunction, "If you want to know the law and nothing else, you must look at it as a bad man . . . ."<sup>180</sup> Holmes's bad man cares only for the "material consequences" of his conduct—what happens to him if he acts in a certain way.<sup>181</sup> Although Holmes framed his definition of law in terms of "what the courts will do in fact,"<sup>182</sup> the bad man should actually consider how the legal system taken as a whole—that is, including prosecutors and others—will react to his conduct. When the courts or prosecutors will not enforce a statute, because they think it is unconstitutional or because it has a trigger provision stating that it is not yet effective, the statute does not satisfy Holmes's definition of "law."<sup>183</sup>

The sense that unenforced laws serve no legal function runs through our jurisprudence. "Desuetude, the obscure doctrine by which a legislative enactment is judicially abrogated following a long period of nonenforcement, cur-

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177. RAZ, *supra* note 168, at 210, 213.

178. Fallon, *supra* note 169, at 8. Fuller might describe the issue as "a failure of congruence between the rules as announced and their actual administration," FULLER, *supra* note 171, at 39, though his explanation of "congruence" focuses on the interpretive fidelity of those applying statutory law, particularly judges. *Id.* at 81–91. If, however, lawmaking means "subjecting human conduct to the governance of rules," *id.* at 91, there is no reason why creative judicial interpretation of statutes is more problematic than total non-enforcement. *Cf.* RAZ, *supra* note 168, at 210, 218 ("Not only the courts but also the actions of the police and the prosecuting authorities can subvert the law [through selective non-enforcement of certain types of laws or against certain classes of offenders].").

179. Fuller would say they are not law. FULLER, *supra* note 171, at 34; *see also* David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, in NATURAL LAW AND MODERN MORAL PHILOSOPHY 176, 184 (Ellen Frankel Paul et al. eds., 2001) ("Fuller is simply pointing out that whatever King Rex did when he issued directives in a fashion that entirely lacked the characteristic excellences of the lawgiver's craft, he was not subjecting human conduct to the governance of rules. He was not making law.").

180. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

181. *Id.*

182. *Id.* at 461 (emphasis added).

183. *Cf.* JEROME FRANK, LAW AND THE MODERN MIND 51–52 n.4 (1930).

rently enjoys recognition in the courts of West Virginia and nowhere else.”<sup>184</sup> But the non-legality of an unenforced law seems implicit in the Supreme Court’s analysis of the Texas sodomy statute in *Lawrence v. Texas*.<sup>185</sup> There, Justice Kennedy rejects the *Bowers* Court’s references to a long history of “state intervention”<sup>186</sup> against homosexual conduct by invoking “a pattern of nonenforcement [of sodomy laws] with respect to consenting adults acting in private.”<sup>187</sup> The strong legal tradition of state inaction against gay people advanced the Court’s argument that the Texas statute was invalid.<sup>188</sup>

The point here is not that trigger laws might be invalid under the doctrine of desuetude. Although desuetude also serves the Rule-of-Law norm against arbitrary enforcement, “[t]he rationale [behind desuetude] is that unenforced laws lack support in public convictions”<sup>189</sup> or that “the public no longer supports the moral argument that lies behind” the statute.<sup>190</sup> The abortion trigger laws, on the other hand, have enjoyed recent support in the legislatures that have adopted them, and there is no evidence that their public support has since eroded. Instead, my argument is simply that trigger laws place in the statute books “legal” commands that will not be enforced and that writing void laws is repugnant to the Rule of Law, which “requires . . . that laws must be applied.”<sup>191</sup>

#### B. TRIGGER LAWS MISFIRE

More Rule-of-Law problems arise once we face the difficulty of deciding when the trigger has been pulled. The Supreme Court is often unclear in its treatment of precedent and leaves ambiguous whether a prior case has been overruled or remains good law. State officials charged with determining whether

184. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006).

185. 539 U.S. 558 (2003); see Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27 (2003).

186. *Lawrence*, 539 U.S. at 571 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring)).

187. *Id.* at 573 (emphasis added).

188. See *id.* (noting that only four of the thirteen states with sodomy laws enforce them only against homosexuals); *id.* at 570 (“Post-*Bowers* even some of the[] States [that ‘singled out same-sex relations for criminal prosecution’] did not adhere to the policy of suppressing homosexual conduct.”); *id.* at 572 (noting that, even at the time *Bowers* was decided, “these prohibitions often were being ignored”) (citing *Bowers*, 478 U.S. at 198 n.2 (Powell, J., concurring)).

Justice Powell appears to have been more willing to uphold the anti-sodomy statute at issue in *Bowers* because it was long unenforced. See *Bowers*, 478 U.S. at 198 n.2 (Powell, J., concurring) (“The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.”). Years after the decision, he would write to Laurence Tribe, who had argued the law’s unconstitutionality, “I did think the case was frivolous as the Georgia statute had not been enforced since 1935.” JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 530 (Macmillan Publ’g Co. 1994).

189. Sunstein, *supra* note 185, at 50.

190. *Id.* at 51.

191. J.M. Balkin, *The Rule of Law as a Source of Constitutional Change*, 6 CONST. COMMENT. 21, 22 (1989).

trigger laws take effect might mistakenly think the Court has overruled itself even if the Justices do not read a decision that way. Ambiguity regarding whether the Supreme Court has overruled itself (or whether it is “reasonably probable” that the Court will overrule itself) casts doubt upon trigger laws’ effectiveness, leaving their application to be decided by the low-level officials tasked with enforcing them. Those officials must choose whether to adhere to the Court’s preexisting doctrine or to their state superior’s determination that the law is no longer valid. Uncertainty about which approach those numerous officials will favor causes Rule-of-Law problems related to notice and arbitrariness.

### 1. When Is a Decision Overruled?

Whether the Supreme Court has overruled itself is a difficult question that often lacks a clear “yes” or “no” answer,<sup>192</sup> and an opinion might be consistent or inconsistent with an earlier decision on a number of different levels.<sup>193</sup> The individual Justices’ disagreement about whether a decision is faithful to precedent demonstrates the question’s difficulty. *Planned Parenthood v. Casey*<sup>194</sup> provides an example of such disagreement. The joint opinion of Justices O’Connor, Kennedy, and Souter declared that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed,”<sup>195</sup> while the *Casey* dissenters skewered that assertion:

Whatever the “central holding” of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of [*stare decisis*]. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.<sup>196</sup>

Expressing dislike for the constitutional standard adopted by the authors of the joint opinion, Justice Scalia was skeptical that there was an answer to the question of whether *Roe* was overruled: “I am certainly not in a good position to dispute that the Court *has saved* the ‘central holding’ of *Roe*, since to do that . . . would require me to understand (as I do not) what the ‘undue burden’ test means.”<sup>197</sup>

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192. See Roosevelt, *supra* note 88, at 1319.

193. See *id.* at 1316.

194. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

195. *Id.* at 846.

196. *Id.* at 954 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

197. *Id.* at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).

Justice Scalia has argued that Rule-of-Law concerns should lead the Court to clarify any ambiguity surrounding precarious precedent. In *Hein v. Freedom from Religion Foundation*, 127 S. Ct. 2553 (2007) (plurality opinion), Justice Scalia called on the majority either to provide a reason for distinguishing prior case law or reject the logic on which the precedent rested: “If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides:

Fifteen years after *Casey*, the Court again left observers wondering about *Roe*'s (and *Casey*'s) continuing authority. In *Gonzales v. Carhart* (*Carhart II*),<sup>198</sup> the Court upheld a federal ban on “partial-birth abortion” that was not limited to post-viability procedures and did not include an exception for cases where abortion was necessary to protect the pregnant woman’s health.<sup>199</sup> The majority explained that its decision rested on “a premise central to [the *Casey* joint opinion’s] conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life . . . .”<sup>200</sup> In dissent, Justice Ginsburg criticized her colleagues for “blur[ring] the line, firmly drawn in *Casey*, between previability and postviability abortions” and, “for the first time since *Roe*, . . . bless[ing] a prohibition with no exception safeguarding a woman’s health.”<sup>201</sup> At the same time, some commentators found in the majority opinion hints that *Casey* and *Roe* no longer enjoy the support of a majority of the Court.<sup>202</sup>

Did *Casey* overrule *Roe*? Did *Carhart II* overrule *Casey*, *Roe*, or both? These are not easy questions because whether we think a precedent is overruled depends on what we consider its holding. *Casey* is both consistent and inconsistent with *Roe*, following *Roe* by finding protection for a woman’s right to choose in the Constitution but departing from *Roe* by abandoning the “strict scrutiny” test.<sup>203</sup> As suggested by Justice Ginsburg, *Carhart II* is inconsistent with two important principles of *Roe* and *Casey*—the requirement that abortion regulations provide exceptions when necessary to protect the woman’s health and the distinction between pre- and post-viability abortions. But the Court could claim adherence to both precedents by leaving intact its holdings that the

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Either *Flast v. Cohen* should be applied . . . or *Flast* should be repudiated.” *Id.* at 2573–74 (Scalia, J., concurring) (citation omitted). And in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007), decided the same day as *Hein*, Justice Scalia described Justice Roberts’s attempt to distinguish prior case law as “indefensible” and “unpersuasive.” *Id.* at 2683 n.7 (Scalia, J., concurring). “[T]he opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.” *Id.* (citation omitted).

198. *Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124 (2007).

199. *See id.* at 147, 165.

200. *Id.* at 145.

201. *Id.* at 171 (Ginsburg, J., dissenting).

202. *See, e.g.*, Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1520 (2008) (“The failure of the majority opinion in *Gonzales* to in any way reaffirm the abortion right derived from *Roe* and *Casey* is striking.”); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 265, 267 n.27 (2007) (stating that Justice Kennedy “characterize[s] the Court’s opinion as consistent with, not an endorsement of, prevailing abortion jurisprudence”); *see also Carhart II*, 550 U.S. at 145 (majority opinion) (“The principles set forth in the joint opinion in [*Casey*] did not find support from all those who join the instant opinion. Whatever one’s views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion . . . would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.” (internal citations omitted)); *id.* at 169 (Thomas, J., concurring) (“I write separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and [*Roe*], has no basis in the Constitution.”).

203. *See* Roosevelt, *supra* note 88, at 1316–17.

Constitution protects a woman's right to choose.<sup>204</sup>

If the Justices themselves disagree about whether precedent remains good law, it follows that state actors—whether attorneys general or legislators without legal training—might also *incorrectly* read an ambiguous Supreme Court opinion as overruling a prior decision. More problematically, those state actors might take the appointment of a new Justice or dicta in one Justice's opinion as an indication that it is "reasonably probable" that the precedent is no longer good law.

When state actors responsible for deciding when trigger laws become effective misread the tea leaves, trigger laws misfire. Misfiring is a Rule-of-Law problem because it leaves the state's population without proper notice of the newly effective law and law enforcement without consistent legal directives.

## 2. Conflicting Commands to Low-Level State Officials

Officials' employment-related obligations to obey their superiors' orders do not subsume their independent duty to interpret and enforce the Constitution, which may require resignation in the face of a superior's persistence in unconstitutional action. Still, low-level officials obligated to interpret the constitutional scope of their authority may reasonably seek guidance from more authoritative interpreters—the Court or higher-ranking non-judicial actors. Given conflicting commands of state law and Supreme Court precedent, the decision of which law to apply falls to the low-level state officials alone. When a state attorney general determines that the Supreme Court has overruled *Roe*, but the Court has not done so explicitly, lower-level officials—prosecutors and police—asked by the state to enforce the trigger law's substantive provisions need to determine which authority to follow. Trigger laws therefore illustrate how responsibility falls to low-level officials when no single institution has final authority and institutions to which other interpreters might defer are in disagreement. Such conflicts pose a problem for popular constitutionalism and departmentalism, which often emphasize the democratic legitimacy of extrajudicial interpreters of the constitution.

Scholars who dispute the need for a single authority to settle questions of constitutional law largely ignore that one practical effect of unsettlement is to leave to low-level officials the determination of whether a given course of conduct is constitutional.<sup>205</sup> Saikrishna Prakash and John Yoo, for example, paper over the problem by discussing the interpretive authority of "each

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204. On "[t]he hollowing out of *Roe v. Wade*," see generally Dawn Johnsen, *The Outer Shell*, SLATE, Jan. 25, 2006, <http://www.slate.com/id/2134849>.

205. Sandy Levinson is a prominent counterexample. Professor Levinson argues that decisionmaking by low-level officials logically flows from the absence of a single authoritative interpreter of the Constitution. Levinson's argument is based not on conflicting directives given low-level officials by other authoritative constitutional interpreters but on his particular conception of non-hierarchical, "protestant" constitutionalism. See generally LEVINSON, *supra* note 80, at 27–37. Levinson's protestant constitutionalism celebrates a wide distribution of interpretive authority:

branch”<sup>206</sup> and focusing on the highest-ranking officials in each.<sup>207</sup> They pin their argument for extrajudicial constitutional interpretation on the fact that “members of each branch take an oath to the Constitution, which means, at a minimum, that they must discern the meaning of the Constitution they are pledged to uphold.”<sup>208</sup> But Prakash and Yoo neglect the oath taken by lower-rung officials, who may need to answer their own constitutional questions, perhaps with the guidance of other interpretive authorities like the Court or the President. Where should an official look, however, when the interpretive authorities to whom he usually defers interpret the Constitution differently? Should he take the action his superior insists is constitutional, or should he defer to the constitutional line drawn by the Court? The official is left to his own devices: deference to one or the other is inappropriate because the official “must discern the meaning of the Constitution [he is] pledged to uphold” and there is no final authority to which he can defer.

If the Court’s interpretive authority is shared with those who head the political branches of the state and federal governments, and if low-level officials defer both to their superior officers and to the Court, then conflicting interpretations by those authorities leaves the subordinates in a bind. They cannot be bound by both interpretations because those interpretations are mutually exclusive. Absent a well-established rule for determining which interpretation pre-

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Joining the literally millions of federal servants are, of course, millions of other public officials who work for state and local governments. All are required by Article VI of the Constitution to pledge to that document their ultimate fealty. And beyond (and above) all of these officials stands the general citizenry, who might have their own role to play as constitutional interpreters . . . .

Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 375 (1994).

Although the discussion here focuses on advocates of extrajudicial interpretation, scholars on the other side of the debate also have not developed this critique. Alexander and Schauer argue that “it is . . . a function of a constitution as of law in general to settle authoritatively what ought to be done, and to coordinate for the common good the . . . behavior of individual officials.” Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 54, at 1376. The absence of a single authoritative interpreter, they claim, is “at odds with the rule of law itself” because it defeats the ability of individuals to “know[] what the law is and know[] how to comply.” Alexander & Schauer, *A Reply*, *supra* note 54, at 482. Although they do not directly address whose knowledge of legality the Rule of Law requires, the examples used to illustrate their arguments suggest that the authors are thinking of individuals outside government who base their conduct by knowledge of legal rules. *See, e.g.*, Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 54, at 1371 (citing the need to induce “socially beneficial cooperative behavior and provid[e] solutions to Prisoner’s Dilemmas and other problems of coordination,” to decide “whether people should drive on the left side or the right side of the road,” and to choose rules to govern “[t]he systems of property, contract, and securities trading”). They too, then, do not address how the lack of a single authority shifts constitutional decisionmaking to low-level bureaucrats or police officers.

206. *See* Prakash & Yoo, *supra* note 55, *passim*.

207. *See, e.g., id.* at 1556 (limiting their analysis to the President and Congress).

208. *Id.* at 1556.

vails,<sup>209</sup> low-level officials will be forced to make an ad hoc determination about which to obey.

Nor does the availability of judicial review of those officials' action make their decisions any less their own or soften the implications for the Rule of Law. If the state attorney general concludes that a trigger law has taken effect, then prosecutors around the state will be free to initiate prosecutions. Some prosecutions may be enjoined, but others may not. Trial courts may disagree about the prosecutions' constitutionality, and a considerable period of time could pass before the state's highest court resolves the issue on a statewide scale. Meanwhile, defendants would endure the burdens of a criminal trial, while others wait, contemplating the possibility of their own prosecution. How these potential defendants are treated by the legal system depends largely on the local prosecutor's conclusion regarding the constitutionality of the purportedly effective trigger law.

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How a state legislature's or governor's disagreement with the Court places the burden of decision on low-level officials is illustrated by southern resistance to school integration after *Brown*. In Louisiana, the state legislature challenged the U.S. district court in a tug-of-war over the desegregation of New Orleans schools. "[A]t every session" between 1954 and 1960, the legislature "enact[ed], and re-enact[ed], measures directly intended to deny colored citizens the enjoyment of their constitutional right [to desegregated education]," culminating in 1960 in an "interposition declaration . . . purport[ing] to nullify the right itself."<sup>210</sup> When the district court requested that the School Board of Orleans Parish submit a desegregation plan, "a new line of attack was initiated [by the legislature]. Orleans Parish and its School Board now became the prime target."<sup>211</sup>

The Louisiana Legislature initially enacted measures to deprive the Board of the power to comply with the orders of the court. In consequence, the Orleans School Board offered no suggestions and th[e] court was compelled to devise its own plan of desegregation, admittedly a modest one involving initially only the first grade . . . . At length, the Orleans Parish School Board realized its clear duty and announced its proposal to admit five Negro girls of first-grade age to two formerly all-white schools. But for obeying the constitu-

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209. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 95 (2d ed. 1994) (explaining that "rules of recognition" in a developed legal system are complex and numerous and that "provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute"); Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 54, at 1377 ("When the Constitution is subject to multiple interpretations, a preconstitutional norm must referee among interpretations to decide what is to be done.").

210. *Bush v. Orleans Parish Sch. Bd.*, 190 F. Supp. 861, 864 (E.D. La. 1960) (per curiam).

211. *Id.* at 865.

tional mandate and the orders of th[e] court, the Board brought on itself the official wrath of Louisiana.<sup>212</sup>

The legislature proceeded to take “every conceivable step to subvert the announced intention of the local School Board and defy the orders of th[e] court.”<sup>213</sup> It attempted to abolish the board and transfer control of New Orleans schools to the legislature, to remove the majority of the board from office, to deny the board access to its own funds, to prevent local banks from honoring the board’s checks, to replace the board’s counsel with the state attorney general, and to assert that each of these acts was insulated from review by the district court.<sup>214</sup> Caught in the crossfire between the district court and the legislature, the board was left with little legal guidance about how (and whether) to proceed with desegregation.

In Virginia, the state Pupil Placement Board denied black students enrollment in predominantly white schools and white students enrollment in black schools, regardless of whether the local school boards recommended that their applications be granted.<sup>215</sup> Holding the state’s pupil-placement scheme unconstitutional as applied, the district court wrote of the predicament of the local school boards:

[T]he melody of massive resistance lingers on. To require and expect local school boards to adhere to their constitutional duties under the oath of their office would be futile when the exclusive power of placement and enrollments vests in this Pupil Placement Board. The School Board of the City of Norfolk, having endeavored since August, 1958, to meet the grave problem of racial mixing in public schools in the face of adversity, and having had remarkable success in such efforts, should no longer be hampered by . . . [a] Board [that] admittedly has no intention of performing its duties in a constitutional manner.<sup>216</sup>

As with New Orleans, Virginia provides another example of local authorities attempting to discern and comply with their constitutional duties. The local school boards must determine their obligations in the face of conflicting guidance of the federal courts on one hand and the state legislature and administrative agencies on the other.<sup>217</sup>

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212. *Id.*

213. *Id.*

214. *See id.* at 865–67.

215. *Beckett v. Sch. Bd. of Norfolk*, 185 F. Supp. 459, 460 (E.D. Va. 1959).

216. *Id.* at 462–63.

217. In one Arkansas case, interference with the school board’s desegregation plans came not from state officials but private individuals. The school board sued to enjoin the private parties, including White America, Inc., the Citizens Committee Representing Segregation, and the White Citizens Council, from continuing to trespass on school property, intimidating individual board members, calling for mass violence to resist desegregation, planning boycotts of the schools, and threatening vexatious litigation. *See Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91, 93–94 (8th Cir. 1956). The Eighth Circuit concluded that having taken the oath of office to uphold the Constitution gave the school board

And of course there is Arkansas Governor Orval Faubus's resistance to school desegregation in Little Rock, which gave rise to the Court's decision in *Cooper v. Aaron*.<sup>218</sup> After *Brown*, the Little Rock school board stated its intent to follow the Court's decision and initiated a desegregation program.<sup>219</sup> "Although the members of the board disagreed with *Brown*, none of them wanted to disobey what they saw as the 'law of the land.'"<sup>220</sup> Other Arkansas officials were less willing to comply: the legislature adopted a law "relieving school children from compulsory attendance at racially mixed schools,"<sup>221</sup> and Faubus deployed the Arkansas National Guard to prevent black students from enrolling in Central High.<sup>222</sup> When the district court issued an injunction against the Guard three weeks after school was to have begun, state and local police ushered the nine black children into the school for their first day of class.<sup>223</sup>

Commentary on *Cooper v. Aaron* and extrajudicial constitutionalism tends to position Governor Faubus's interpretation of the Constitution against the Court's.<sup>224</sup> These accounts exclude an interpretive role for the school board, members of the Arkansas National Guard, and state and local police. The Court said the Constitution required school integration; Faubus said the Constitution permitted, and Arkansas law required, segregation. To faithfully execute the law, the school board, national guardsmen, and police officers needed to determine which interpretation was correct or offer a third alternative. The decisions of these low-ranking officials determined, in part, how events played out on the ground.

### 3. Misfiring Creates Rule-of-Law Problems

It might not be immediately clear why confronting low-level officials with differing constitutional interpretations is a Rule-of-Law problem. Professor Fuller, for example, explained that his eight principles of legality addressed the relationship between the lawgiver and the citizen, not the lawgiver and the law-applier.<sup>225</sup> The latter relationship, he wrote, dealt with "managerial direction" rather than "law."<sup>226</sup> Although Fuller recognized that the relationship between the lawgiver and those tasked with enforcing the law could have

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members "a federal right, to be free from direct interference in the performance of that duty." *Id.* at 98–99. For a brief discussion of the case, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 17–19, 22–23, 25–27 (Ox Bow Press 1985) (1969) (arguing that the Eighth Circuit reached the right result but incorrectly relied on the school board's oath in framing the case).

218. 358 U.S. 1 (1958).

219. *Id.* at 7–9.

220. Farber, *supra* note 76, at 391. "[T]he Board's attorneys assured them that [this approach] represented a *legal minimum* of compliance with the law." *Id.* (emphasis added).

221. *Cooper*, 358 U.S. at 9.

222. *Id.*

223. *Id.* at 11–12.

224. See, e.g., TUSHNET, *supra* note 56, at 7–25.

225. See FULLER, *supra* note 171, at 207–14.

226. *Id.* at 207.

collateral effects on individuals outside government,<sup>227</sup> he does not appear to have seen those effects as raising substantial Rule-of-Law concerns.

Fuller overlooked that giving inconsistent directives to those tasked with applying the law defeats numerous Rule-of-Law objectives. Absent a meta-rule that tells them on which authority to rely, different low-level officials asked to apply one rule by the legislature or governor and a contrary rule by the Court will likely reach different conclusions. Inconsistent enforcement by different low-level officials defeats Fuller's principle that law must be generally applicable and not decided on an ad hoc basis. That inconsistency creates notice problems when individuals subject to an official's authority cannot predict which rule will be applied.

Mark Tushnet writes that leaving to low-ranking officials decisions about when to disregard constitutional doctrine articulated by the courts "may introduce too much instability into the constitutional system to be tolerable."<sup>228</sup> "[T]hese risks," he writes, "are great enough to justify rejecting the argument that low-level bureaucrats like police officers should be allowed to make all-things-considered judgments . . ."<sup>229</sup> Once we recognize that the decision-making burden falls on low-level officials whenever they are asked to take action that appears foreclosed by decisions of the Court, perhaps we have reasons to doubt non-judicial state actors' claims to authority to interpret the Constitution with finality.

### C. STABILITY

The Rule-of-Law principle that the law should be capable of guiding people's conduct requires that the law be relatively stable.<sup>230</sup> But how much stability is necessary? How frequently can the law permissibly change? Surely total stability, such that the law cannot be changed, is undesirable, and a prohibition on altering the law for a specified length of time would be only somewhat less so.<sup>231</sup> As Professor Raz has explained, "The requirement of stability cannot be usefully subject to complete legal regulation. It is largely a matter for wise governmental policy."<sup>232</sup> Trigger laws are premised on anticipated changes in the Court's interpretation of the Constitution and would change state law when the Court decides that the new rules would be constitutionally permissible. Do

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227. *Id.* ("The directives of a managerial system regulate primarily the relations between the subordinate and his superior and *only collaterally* the relations of the subordinate with third persons." (emphasis added)).

228. TUSHNET, *supra* note 56, at 47.

229. *Id.* Professor Tushnet, however, "find[s] the question to be quite close." *Id.* Because his version of popular constitutionalism removes judicial review from the picture altogether, *see id.* at 154–76, Professor Tushnet has no reason to discuss conflicting constitutional commands from different authorities.

230. *See* RAZ, *supra* note 168, at 210, 213; *see also* Fallon, *supra* note 169, at 8 ("The law should be reasonably stable, in order to facilitate planning and coordinated action over time.").

231. On the latter point, *see* FULLER, *supra* note 171, at 79–80.

232. RAZ, *supra* note 168, at 210, 215.

trigger laws contemplate an imprudent degree of instability?

At first blush, the answer appears to be “no.” Until they are actually triggered, trigger laws do not actually change the laws by which individuals guide their conduct. To the extent that trigger laws do alter positive law, they arguably increase stability by informing people what the state law will be should constitutional law change. Moreover, because trigger laws are immune to judicial review, they are less likely to hasten changes in the Court’s interpretation of constitutional law than are similar statutes designed to bring test cases in court. So it would seem that trigger laws do increase stability in the legal system.

But the answer is not so simple. If a state has no trigger law, then in most cases the Court’s decision would simply permit new legislation in an area where states could not previously legislate.<sup>233</sup> States would become free to adopt new laws, but the conduct is just as regulated the day after the Court’s decision as the day before. If a state has a trigger law in place, however, conduct that was not regulated by the state before the decision is immediately subject to new restrictions. The trigger law makes automatic a legal change that would not otherwise take place, adding to the instability inherent in the Court’s own decision. Thus, trigger laws do not provide individuals more information about what law will govern their conduct if the Court overrules itself; they only change the default rules from ones that were previously constitutionally mandated to ones that were previously constitutionally prohibited.<sup>234</sup>

Does that instability rise to an intolerable level? Rule-of-Law arguments about stability are generally addressed to the needs of individuals engaged in long-term planning.<sup>235</sup> In the case of abortion trigger laws, the period within which the decision to terminate a pregnancy must be made is perhaps not long enough for changes in the law to substantially affect the decisions of many women who were already pregnant. The harm to women who had relied on their current rights could also be mitigated by deferring the trigger law’s effectiveness for some period after it is triggered.<sup>236</sup> The Mississippi abortion trigger law, for example, does not become effective until ten days after the state attorney general determines that the Court has overruled *Roe* or that it is reasonably likely to uphold the statute.<sup>237</sup> At the same time, for those women

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233. In the case of abortion, the overruling of *Roe* would leave abortion regulated or prohibited by a complicated mesh of state laws. See generally Fallon, *supra* note 43.

234. Public policy concerns may generally disfavor giving immediate effect to previously unconstitutional laws. Treanor and Sperling argued that a law that has been invalidated for infringing individual liberty should be ratified by a present-day majority rather than be automatically “revived” by a judicial decision. See Treanor & Sperling, *supra* note 44, at 1941, 1949–54.

235. See RAZ, *supra* note 168, at 210, 214–15.

236. Cf. FULLER, *supra* note 171, at 80 (“[S]ometimes an action taken in reliance on the previous law can be undone, provided some warning is given of the impending change and the change itself does not become effective so swiftly that an insufficient time is left for adjustment to the new state of the law.”).

237. MISS. CODE ANN. § 41-41-45 (Supp. 2008). Such a deferral may even be constitutionally required. If a state shortens the statute of limitations for certain claims, it must leave individuals for whom the statute has not yet run “reasonable time” to file and cannot apply the law to individuals who

who have relied on the rights protected by the Court's current abortion jurisprudence, the consequence of an abortion ban taking effect immediately upon *Roe*'s reversal would be quite dramatic. Whether we think trigger laws introduce too much instability into abortion law, therefore, may turn in part on the specific trigger provision in question, but the answer more likely depends on our views on the substantive laws at play and the other elements of the Rule of Law involved.

#### IV. ALTERNATIVES TO TRIGGER LAWS

State lawmakers—and everyone else, too—may disagree with the Court's interpretation of the Constitution without casting doubt on judicial supremacy. “The concept of judicial supremacy . . . does not mean that courts are empowered to determine citizens' beliefs about the Constitution.”<sup>238</sup> If state legislators disagree with the Supreme Court's interpretation of the Constitution but do not want to challenge the Court's authority to interpret the Constitution with finality, what options remain open for the legislature to express its views and urge the Court to change its own? Trigger laws are one possibility, but there are alternatives that may not impose the same Rule-of-Law costs.<sup>239</sup>

##### A. ARTICLE V AMENDMENT

State legislatures disagreeing with the Court's interpretation of the Constitution could seek to change the constitutional text itself.<sup>240</sup> The Constitution

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have passed the new deadline but not yet reached the old one. *See* *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161–62 (1913), *cited in* FULLER, *supra* note 171, at 80–81. Trigger laws that do not provide a “reasonable time” for individuals to act under the old law—such as the South Dakota, North Dakota, and Louisiana abortion trigger laws, which take effect the same day the Court overrules *Roe*—may therefore be unconstitutional as applied in some cases.

238. Post & Siegel, *supra* note 55, at 1030.

239. The executive branch of a state government may participate in constitutional dialogue with the courts even in the absence of any legislative activity through the office of the state solicitor general. The state solicitor general can write briefs and appear before courts to argue the state's position that the Supreme Court's existing case law is misguided or is sufficiently narrow to allow states to adopt laws arguably at odds with the constitutional right articulated by the Court. This approach mirrors one taken on occasion by the United States Solicitor General. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Appellants at 23–30, *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379).

At least five states currently have state solicitors general, usually skilled and experienced advocates, to represent them before the Supreme Court. *See* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1501 (2008). *See generally* James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. APP. PRAC. & PROCESS 533 (2001). If a state seeks a more expansive role in shaping national constitutional law, one approach is to increase the quantity and quality of its appearances before the Court and the courts of appeals.

240. Constitutional amendments are a means of bringing constitutional meaning into line with popular preferences. That much popular constitutionalist scholarship focuses on how constitutional meaning changes outside the amendment process is more a function of the difficulty of amending the Constitution than the categorical exclusion of amendments from “popular constitutionalism.” Thank you to Vicki Jackson for clarifying this point.

assigns state legislatures a special role in the amendment process. Article V provides that “on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments,” which become effective upon ratification by three-fourths of the states.<sup>241</sup> No such convention has ever occurred, however,<sup>242</sup> either because convention proponents were unable to muster the support of enough state legislatures<sup>243</sup> or because Congress made a convention unnecessary by proposing the amendment on its own initiative.<sup>244</sup>

Opponents of *Roe* have sought to nullify the decision using both Article V processes for proposing amendments: constitutional convention and congressional proposal. Between 1974 and 1980, twenty states submitted applications calling for a constitutional convention to consider an amendment that would abrogate *Roe*.<sup>245</sup> Those states include three that now have trigger laws on the

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241. U.S. CONST. art. V. See generally James Kenneth Rogers, Note, *The Other Way To Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005 (2007) (exploring the history of the Convention Clause and discussing uncertainties about its use).

242. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 940 (2d Sess. 2002).

243. See *id.* at 942. Several amendment drives initiated by state legislatures have fallen narrowly shy of the necessary supermajority. Those proposed amendments would have limited income taxes, curbed the Supreme Court's oversight of legislative reapportionment, and required a balanced federal budget. *Id.*

244. See *id.* (“Only one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators.”). If two-thirds of the state legislatures applied to Congress for a convention, Congress would apparently be left out of the amendment process entirely, see Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 399 (1983), other than its non-discretionary act of calling the convention. See U.S. CONST. art. V (“The Congress, . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention . . .” (emphasis added)). But cf. E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1078 (suggesting that Congress might avoid calling a constitutional convention by “interpreting legalistically petitions from thirty-four states, in defiance of the popular will”).

245. This datum is based on Professor Paulsen's 1993 catalogue of hundreds of state applications for constitutional conventions. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677 app. (1993). The twenty states that have submitted applications for a convention to consider an abortion-related amendment are: Alabama, 126 CONG. REC. 10,650 (1980); Arkansas, 123 CONG. REC. 15, 808–09 (1977); Delaware, 124 CONG. REC. 19,683 (1978); Georgia, 125 CONG. REC. 4372 (1979) (rescinded, 150 CONG. REC. H3605 (2004)); Idaho, 126 CONG. REC. 6172 (1980) (rescinded, 146 CONG. REC. 1449–50 (2000)); Indiana, 123 CONG. REC. 4797 (1977) (repeating an application from 1974); Kentucky, 124 CONG. REC. 9697 (1978) (Kentucky also sent Congress an application for an abortion-related convention in 1974); Louisiana, 122 CONG. REC. 23,550 (1976) (rescinded, 138 CONG. REC. 669 (1992)); Massachusetts, 123 CONG. REC. 22,002 (1977); Mississippi, 125 CONG. REC. 3196 (1979); Missouri, 121 CONG. REC. 12,867 (1975); Nebraska, 124 CONG. REC. 12,215 (1978); Nevada, 125 CONG. REC. 16,350 (1979); New Jersey, 123 CONG. REC. 10,481 (1977); Oklahoma, 126 CONG. REC. 8972 (1980); Pennsylvania, 124 CONG. REC. 11,438 (1978); Rhode Island, 123 CONG. REC. 15,808 (1977); South Dakota, 123 CONG. REC. 11,048 (1977); Tennessee, 126 CONG. REC. 9765 (1980); Utah, 123 CONG. REC. 13,057–58 (1977) (rescinded, 147 CONG. REC. 6414, 19,025 (2001)). Paulsen considers many of these applications invalid because they purport to limit the subject matter of amendments the convention may propose. See Paulsen, *supra*.

books: Louisiana, Mississippi, and South Dakota.<sup>246</sup> When the convention movement failed to win the support of enough states, abortion opponents shifted their focus to persuading Congress to propose an amendment.<sup>247</sup> These efforts culminated in the 1983 defeat of the Hatch-Eagleton Human Life Federalism Amendment.<sup>248</sup> “Having finally received a vote in a Republican-controlled Senate and having failed, the pro-life movement could not easily generate enthusiasm for another fight over a constitutional amendment.”<sup>249</sup>

At first blush, Article V seems to provide the method of constitutional change most consistent with Rule-of-Law norms. Joseph Raz has described as “one of the important principles” of the Rule of Law “that the making of particular laws should be guided by open and relatively stable general rules.”<sup>250</sup> Article V would seem to satisfy that principle by providing the general procedural rules for generating particular changes to the existing constitutional text.

Although Article V initially appears to satisfy the Rule-of-Law needs of a changeable constitution, it is not without its own Rule-of-Law deficits. Because of the vagueness of its terms, Article V introduces nearly as much procedural uncertainty as it resolves. With respect to proposing amendments through the convention process,<sup>251</sup> the greatest open question is whether the states, or Congress, could effectively limit the scope of the constitutional changes proposed by the convention. Can the convention be limited to consideration of whether a particular, pre-drafted amendment should be proposed to the states? Answering this question in the negative, and fearing a “runaway convention,” a

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246. See *supra* note 245.

247. See Glen A. Halva-Neubauer, *The States After Roe: No “Paper Tigers,”* in UNDERSTANDING THE NEW POLITICS OF ABORTION 167, 170 (Malcolm L. Goggin ed., 1993) (“Changing political fortunes brought about by the 1980 elections gave antiabortion partisans new hope that Congress would propose a human life amendment, thus quelling the [constitutional convention] effort.”).

248. 129 Cong. Rec. 17,578 (1983). See generally LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 161–65 (1990).

249. TRIBE, *supra* note 248, at 164. Neither house of Congress has since held a formal vote on an amendment that would repeal *Roe*. See Nat’l Comm. for a Human Life Amendment, Human Life Amendment, <http://www.nchla.org/issues.asp?ID=46> (last visited June 23, 2009).

250. RAZ, *supra* note 168, at 213 (emphasis omitted). Raz appears primarily concerned here with providing some justification for agency adjudication of particular matters, see *id.* at 216, but his proposition also speaks to the broader need for general rules setting up institutional processes for generating new law. See *id.* at 223.

251. The ratification process also is fraught with Rule-of-Law uncertainties. Take, for example, the scholarly disagreement about whether the Constitution has a Twenty-Seventh Amendment. See U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”). The Amendment was proposed along with what we know as the Bill of Rights in 1789 but was not ratified by three-fourths of the states until 1992. Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 502–03 (1994) (citing 1 ANNALS OF CONG. 87–88 (Joseph Gales ed., 1789); Certification of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21,187 (1992)). Its validity turns on the answers to two apparently open questions: Must amendments be ratified within a certain amount of time after their proposal? And if so, who determines when that period has expired: Congress, the courts, or someone else? On the problem of determining the Constitution’s content, see generally LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

number of states, including four that had applied for conventions to consider proposing an anti-*Roe* amendment, have withdrawn all of their pending applications for conventions and disavowed the Article V convention altogether.<sup>252</sup> One of the four states with abortion trigger laws—Louisiana—falls into this category, having renounced the Article V convention in 1992.<sup>253</sup> Although North Dakota never joined the 1970s movement to repeal *Roe* by constitutional convention and in 2001 followed Louisiana by denouncing the Article V convention process,<sup>254</sup> the state legislature in 2005 adopted a resolution “strongly urg[ing]” Congress to exercise its Article V authority to propose a right-to-life amendment.<sup>255</sup> The fear of a runaway convention reflects concerns about the Rule of Law, about democracy unconstrained by law, and about the uncertainties raised by broad-brush constitutional change. Whether or not those fears are warranted, they are based on a reasonable reading of Article V.<sup>256</sup>

Despite these uncertainties, Article V provides the only formal means of amending the Constitution, and efforts to achieve “informal amendments” through popular constitutionalism may be criticized as detracting from the Constitution’s ordinary amendment process. Whether states have adopted trigger laws instead of pursuing an Article V amendment is not entirely clear. Mississippi and South Dakota have pending before Congress applications for a constitutional convention relating to abortion. If the availability of trigger laws has discouraged their pursuit of an Article V amendment, the effect has been limited to their efforts to bring other states into the movement. Their enactment of trigger laws is better viewed as supplementing their use of the Article V process; these states are simultaneously pursuing constitutional amendment by informal and formal means. Trigger laws and other informal alternatives to an Article V amendment may, however, have influenced Louisiana in deciding to withdraw its application for a constitutional convention and North Dakota in calling on Congress to propose an amendment instead of applying for a convention. Although their departure from the formal amendment process could be faulted on Rule-of-Law grounds, Louisiana and North Dakota also provided Rule-of-Law reasons for not invoking the Article V process. That both formal and informal constitutional amendments raise Rule-of-Law concerns presents a difficulty for those who advocate both constitutional change and commitment to the Rule of Law.

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252. See sources cited *supra* note 245.

253. See 138 CONG. REC. 669 (1992); see also 122 CONG. REC. 23,550 (1976) (application for a constitutional convention regarding abortion). Mississippi and South Dakota’s applications for a convention remain pending. See 125 CONG. REC. 3196 (1979) (Mississippi); 123 CONG. REC. 11,048 (1977) (South Dakota).

254. See 147 CONG. REC. 5905 (2001).

255. 151 CONG. REC. S5850 (2005).

256. Walter Dellinger and Michael Stokes Paulsen agree that Congress cannot limit the scope of a convention called by the states. Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1640 (1979); Paulsen, *supra* note 245, at 738–42.

## B. OTHER ALTERNATIVES

Trigger laws and Article V amendments are not the only means by which a state legislature can shape the course of constitutional law. A state legislature disagreeing with the Court's interpretation of the Constitution has at its disposal a number of other ways to make its voice heard. First, the legislature could assert its own interpretation in a resolution, statement of policy, or statutory preamble without the force of law. Because courts treat such legislative pronouncements as unreviewable, they stand as the legislature's "final" interpretation of the Constitution and as testament to its disagreement with the Court. Because such pronouncements lack the force of law, they do not challenge the Court's authority to articulate enforceable boundaries between state and citizen. Second, the legislature could enact an enforceable statute that touches upon the constitutional interest protected by the Court's interpretation of the Constitution. The legislature risks appearing defiant of the Court's articulation of supreme law, but defiance is best judged by looking at lawmakers' reasons for legislating. If lawmakers hold a good-faith belief that the new statute will be upheld by the Court then enacting the statute should not be treated as a challenge to the Court's place as final interpreter of constitutional meaning. Instead, the legislature is better viewed as an ordinary litigant, creating the conditions for a constitutional test case that may or may not be resolved by courts in a favorable manner.

Without making binding law that runs counter to the Court's constitutional interpretation, state legislatures may adopt resolutions, statements of policy, or statutory preambles that express their disagreement with the Court's reading of the Constitution. A number of state legislatures passed such measures in response to *Roe v. Wade*, and the Supreme Court addressed one such provision in *Webster v. Reproductive Health Services*.<sup>257</sup> The anti-*Roe* preamble to a Missouri statute included findings that "[t]he life of each human being begins at conception"<sup>258</sup> and provided that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child . . . all the rights, privileges, and immunities available to other persons . . . subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court . . ." <sup>259</sup> Adopting the state's argument that the preamble included "prefatory statements with no substantive effect,"<sup>260</sup> the Court read it as expressing a "value judgment" against abortion but "not by its terms regulat[ing] abortion,"<sup>261</sup> and held that the physician plaintiffs therefore lacked standing to challenge the preamble's constitutionality.<sup>262</sup> The manner in

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257. 492 U.S. 490 (1989).

258. MO. ANN. STAT. § 1.205.1(1) (West 2000).

259. *Id.* § 1.205.2.

260. Brief for Appellants at 9, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

261. *Webster*, 492 U.S. at 506.

262. *Id.* at 506-07.

which the Court disposed of the issue suggests that courts should not pass on the constitutionality of statutory preambles containing statements of policy but having no legal effect.

Statutory preambles, resolutions, and policy statements containing constitutional interpretations different from the Court's, like trigger laws, assert constitutional interpretations that are final and unreviewable, but legislation presents different Rule-of-Law problems than do trigger laws. Although they are not effective as law, their ineffectiveness does not hinder the Rule of Law because such legislation never purported to be law. On the other hand, ambiguity as to whether such legislation has any legal effect gives rise to Rule-of-Law concerns regarding clarity and notice. If courts conclude that these provisions are legally effective, then they present the same Rule-of-Law problems as do other conflicts between authoritative constitutional interpreters.

In addition to adopting resolutions with no legal effect, state legislatures might choose to voice their constitutional views by making law. "[S]ometimes legislative action apparently inconsistent with a prior judicial constitutional interpretation is not inconsistent with a general theory of judicial supremacy."<sup>263</sup> State lawmakers might adopt legislation somewhat different from the law that the Court held unconstitutional or even legislation identical to the old law, as long as they have a good-faith belief that the Court's position has since changed.<sup>264</sup> Either tactic may result in a legal challenge to the legislation, allowing the courts to pass on its constitutionality and assert their own final constitutional interpretations.

First, the legislature could enact "distinguishable" legislation, similar to laws held unconstitutional but perhaps sufficiently different to fall outside the scope of the rule announced by the Court.<sup>265</sup> Examples from the abortion context include statutes that do not ban abortion but deny public funding to pay for abortions; the Court has upheld such laws without suggesting that doing so casts doubt on the continuing validity of *Roe*.<sup>266</sup> Such legislation respects judicial supremacy in that it seeks only to limit, rather than subvert, established judicial doctrine. By "distinguishing" the new legislation from that previously held unconstitutional, the legislature acts much like a party to ordinary litigation, explaining to the courts why an unfavorable precedent does not govern the present case. The legislature's interpretive authority need not be more than that of an ordinary party in an ordinary case. Because the courts could agree or disagree with the state's arguments and rule accordingly, the court's interpretation of the Constitution, rather than the legislature's, is final. Legislators have a role in shaping constitutional law, but only to the extent that they can—over time—persuade the courts of their interpretations.

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263. TUSHNET, *supra* note 56, at 17.

264. *See id.* at 17–21.

265. *Id.* at 17–18.

266. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 202 (1991).

Second, lawmakers who recognize judicial supremacy might adopt legislation that cannot be distinguished from that previously struck down when in good faith they conclude that the Court would not adhere to the rule of its previous decision.<sup>267</sup> A reenacted statute identical to that held unconstitutional can create a “test case” by providing the Court with an opportunity to revisit its previous decision.<sup>268</sup> Whether such laws meaningfully recognize judicial supremacy turns on the motives of the legislature enacting the law. Mark Tushnet writes that it is “constitutionally responsible” for legislators adhering to positions of judicial supremacy to vote for legislation that would create a test case when there is “some reasonable ground for believing that the Court would overrule [itself]” and that a “head-count” of the Justices who would likely vote to overrule the precedent “is enough.”<sup>269</sup> As with the legislature that enacts distinguishable legislation, the Court can accept or reject the legislature’s position.

Statutes enacted to prompt test cases are not without their own Rule-of-Law difficulties similar to those associated with trigger laws. What law should guide prosecutors and police is unclear; the rights of individuals acting within the scope of the new law are uncertain. Unlike trigger laws, however,<sup>270</sup> these statutes do not implicate the efficacy principle because they do not include deferred effective dates that make them unenforceable. Moreover, when the legislature acts as lawmaker-litigant, its interpretations of the Constitution are subject to judicial review; it does not claim authority to interpret the Constitution with finality. Legislators who see trigger laws as legislative constitutionalism<sup>271</sup> would make laws that violate the Constitution but remain forever on the books, forever potentially enforceable, because no court can declare them invalid until the trigger is pulled.

#### CONCLUSION

This Note has explored the *rara avis* of the trigger law by probing what seems to be the strongest justification for its existence: state legislatures’ participation in extrajudicial constitutional interpretation. Although some supporters of trigger laws cast their advocacy in the rhetoric of departmentalism and popular constitutionalism, analysis of the abortion trigger laws currently on the books in four states suggests that those claims of legislative constitutionalism are tenuous. The recent history of South Dakota’s anti-abortion legislation

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267. TUSHNET, *supra* note 56, at 19–21.

268. As Mark Tushnet notes, the Court could also squarely overrule itself when it reviews a “distinguishable” law but finds that the two laws cannot in fact be distinguished. That is, the Court would need to conclude that the earlier holding controls if it is still valid. *See id.* at 198 n.42. Trigger laws that take effect when it is “reasonably probable” that the Court will reverse itself might have the same effect.

269. *Id.* at 21.

270. *See supra* section III.A.

271. *See supra* section II.B.2.

suggests trigger laws may not enjoy the support of a present majority of the state's citizens but are enacted in part because few care to oppose legislation that may never take effect. And although advocates of trigger laws sometimes frame their arguments in constitutional terms, their constitutionalism is both narrow and shallow: most of the laws' supporters speak from strong moral conviction but not from identification with the Constitution, and those that do invoke the Constitution seem uninterested in engaging in serious discussion of constitutional meaning.

After critiquing trigger laws within the framework of extrajudicial constitutionalism, the Note points to Rule-of-Law concerns associated with trigger laws. This external critique identifies trigger laws "misfiring" as the source of Rule-of-Law problems shared with other tools of extrajudicial constitutionalism: conflicting constitutional interpretations from the courts and high-ranking non-judicial officers leave lower-ranking officials with poor guidance as to what the Constitution requires and result in those officials' inconsistent enforcement of constitutional norms. That inconsistent directives from more-authoritative interpreters force the constitutional question on low-level officials has been largely left out of the literature on extrajudicial constitutionalism, and the Rule-of-Law problems that result from such a scenario are omitted from leading accounts of the Rule of Law.

The Note concludes by looking at alternatives to trigger laws for state legislatures that seek constitutional change. Neither the formal amendment process prescribed by Article V nor other informal amendment mechanisms are without their own Rule-of-Law difficulties. For state legislatures that both disagree with the Supreme Court's understanding of the Constitution and hope to preserve the Rule of Law under that Constitution, none of these alternatives provides an easy solution. Trigger laws offer no clear path forward but rather call attention to the density of the brush.